Supreme Court, U.S.
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No. 01-___

IN THE

Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE,

Petitioner,

v.

CHARLOTTE J. PRITT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the West Virginia Supreme Court of Appeals apply an incorrect standard for reviewing entry of summary judgment against the defamation claims of respondent, a candidate for Governor of West Virginia and a public figure, by failing to make an independent determination whether respondent had come forward in opposition to a well-supported motion for summary judgment with clear and convincing evidence of actual malice, as required by *New York Times Co. v. Sullivan, Anderson v. Liberty Lobby, Inc.*, and other decisions of this Court?

PARTIES TO THE PROCEEDING

The following were parties to the proceeding in the West Virginia Supreme Court of Appeals: plaintiff Ms. Charlotte J. Pritt, and defendants the Republican National Committee, the National Republican Senatorial Committee, and the West Virginia State Victory Committee. Each defendant is an unincorporated political association. The National Republican Senatorial Committee and the West Virginia State Victory Committee will be filing a separate Petition for a Writ of Certiorari.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 3

STATEMENT OF THE CASE 3

The Facts Giving Rise to this Case 4

Proceedings in the Trial Court 6

Proceedings in the Supreme Court of Appeals 8

REASONS FOR GRANTING THE WRIT 12

I. THE DECISION BELOW IS CONTRARY TO THIS COURT'S CLEAR RULINGS ON THE ROLE OF APPELLATE COURTS IN PUBLIC FIGURE DEFAMATION CASES 12

A. In Public Figure Defamation Cases, the First Amendment Requires Independent Appellate Review To Assure That the Record Contains Clear and Convincing Evidence of Actual Malice.....13

B. The Requirement for Independent Review To Assure That the Record Contains "Clear and Convincing" Proof of Actual Malice Applies at the Summary Judgment Stage of a Public Figure Defamation Case 16

C. The Supreme Court of Appeals Failed To Review the Record and Failed To Apply the "Clear And Convincing" Standard of Proof for Actual Malice 18

II. THE DECISION BELOW CONFLICTS WITH RULINGS FROM THE VAST MAJORITY OF STATE COURTS AND FEDERAL COURTS OF APPEALS.....19

III. IF NOT CORRECTED, THE DECISION BELOW WILL HAVE PROFOUND CONSEQUENCES FOR POLITICAL SPEECH IN WEST VIRGINIA AND ADJACENT STATES 24

CONCLUSION 28

APPENDIX 1a

TABLE OF AUTHORITIES

CASES

Page

Anderson v. Liberty Lobby, 477 U.S. 242 (1986).....*passim*

Anderson v. McCotter, 100 F.3d 723 (10th Cir. 1996) 23

Bartimo v. Horsemen's Benevolent & Protective Ass'n, 771 F.2d 894 (5th Cir. 1985), *cert. denied*, 475 U.S. 1119 (1986).....23

Bose Corp. v. Consumers Union of the U.S., Inc., 466 U.S. 485 (1984).....15, 16, 19, 21

Buckley v. Valeo, 424 U.S. 1 (1976) 2, 24, 26, 27

Carr v. Bankers Trust Co., 546 N.W.2d 901 (Iowa 1996) 21

Chesapeake Publ'g Corp. v. Williams, 661 A.2d 1169 (Md. 1995).....22

Cobb v. Time, Inc., No. 00-5159, 2002 WL 112477 (6th Cir. Jan. 30, 2002).....23

Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996).....24

Contemporary Mission, Inc. v. New York Times Co., 842 F.2d 612 (2d Cir.), *cert. denied*, 488 U.S. 856 (1988).....23

Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).....2, 3

Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967).....14

Dababnah v. West Va. Bd. of Med., 47 F. Supp.2d 734 (S.D. W. Va. 1999).....10

Dale v. Ohio Civil Serv. Employees Ass'n, 567 N.E.2d 253 (Ohio), *cert. denied*, 501 U.S. 1231 (1991) 22

Deaver v. Hinel, 391 N.W.2d 128 (Neb. 1986) 22

Diesen v. Hessburg, 455 N.W.2d 446 (Minn. 1990), *cert. denied*, 498 U.S. 1119 (1991) 22

DiLeo v. Koltnow, 613 P.2d 318 (Colo. 1980) 21

Dombey v. Phoenix Newspapers, Inc., 724 P.2d 562 (Ariz. 1986) 21

Eu v. San Francisco Cty. Democratic Cen. Comm., 489 U.S. 214 (1989) 25

Fitzgerald v. Tucker, 737 So.2d 706 (La. 1999) 21

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) 2

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 14

Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler, 398 U.S. 6 (1970) 20

Guilford Transp. Indus., Inc. v. Wilner, 760 A.2d 580 (D.C. 2000) 20, 21

Gulf Publ'g Co., Inc. v. Lee, 434 So.2d 687 (Miss. 1983) 22

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989) 16

Herbert v. Oklahoma Christian Coalition, 992 P.2d 322 (Okla. 2000) 22

Journal-Gazette Co., Inc. v. Bandido's, Inc., 712 N.E.2d 446 (Ind.), *cert. denied*, 528 U.S. 1005 (1999) 20, 21

Kanaga v. Gannett Co., Inc., 687 A.2d 173 (Del. 1996) 21

Levan v. Capital Cities/ABC, Inc., 190 F.3d 1230 (11th Cir. 1999), *cert. denied*, 528 U.S. 1198 (2000) 23

Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122 (1st Cir. 1997) 23

Liberty Lobby, Inc. v. Rees, 852 F.2d 595 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1010 (1989) 23

Lyons v. Rhode Island Pub. Employees Council, 559 A.2d 130 (R.I.), *cert. denied*, 493 U.S. 892 (1989) 22

MacGuire v. Harriscope Broad. Co., 612 P.2d 830 (Wyo. 1983) 22

Mahoney v. Adirondack Publ'g Co., 517 N.E.2d 1365 (N.Y. 1987) 22

Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985) 23

Margoles v. Hubbart, 760 P.2d 324 (Wash. 1988) 22

Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991) 11, 18, 19

McAvoy v. Shufrin, 518 N.E.2d 513 (Mass. 1988) 22

McCoy v. Hearst Corp., 727 P.2d 711 (Cal. 1986), *cert. denied*, 481 U.S. 1041 (1987) 21

Miami Herald Publ'g Co. v. Ane, 458 So.2d 239 (Fla. 1984) 22

Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) 2, 3

Mills v. Alabama, 384 U.S. 214 (1966) 24

Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) 16, 24

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) ..... *passim*

Newton v. NBC, Inc., 930 F.2d 662 (9th Cir.), *cert. denied*, 502 U.S. 866 (1991) 23

Peeler v. Spartan Radiocasting, Inc., 478 S.E.2d 282 (S.C. 1996), *cert. denied*, 520 U.S. 1275 (1997) 22

Pemberton v. Birmingham News Co., 482 So.2d 257 (Ala. 1985) 21

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) 3, 27

Pritt v. Republican Nat'l Comm., et al., 557 S.E.2d 853 (W. Va. 2001) ..... *passim*

Pritt v. Republican Nat'l Comm., et al., No. 97-C-380(V) (W. Va. Cir. Ct. Fayette Cty. May 15, 2000) ..... *passim*

Reuber v. Food Chem. News, Inc., 925 F.2d 703 (4th Cir.), *cert. denied*, 501 U.S. 1212 (1991) 23

Rouch v. Enquirer & News of Battlecreek Michigan, 487 N.W.2d 205 (Mich. 1992), *cert. denied*, 507 U.S. 967 (1993) 22

Secrist v. Harkin, 874 F.2d 1244 (8th Cir.), *cert. denied*, 493 U.S. 933 (1989) 22, 23

Stromberg v. California, 283 U.S. 359 (1931) 24

Thomson Newspaper Publ'g, Inc. v. Coody, 896 S.W.2d 897 (Ark.), *cert. denied*, 516 U.S. 1008 (1995) 21

Time, Inc. v. Pape, 401 U.S. 279 (1971) 16

Torgerson v. Journal/Sentinel, Inc., 563 N.W.2d 472 (Wisc. 1997) 22

Tucci v. Guy Gannett Publ'g Co., 464 A.2d 161 (Me. 1983) 21, 22

Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 655 A.2d 417 (N.J. 1995), *cert. denied*, 516 U.S. 1066 (1996) 22

Turner v. KTRK Television, Inc., 38 S.W.3d 103 (Tex. 2000) 21

Wanless v. Rothballer, 503 N.E.2d 316 (Ill.), *cert. denied*, 482 U.S. 929 (1987) 21

Wiemer v. Rankin, 790 P.2d 347 (Idaho 1990) 21

Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) 19, 20

CONSTITUTION

U.S. Const. amend. I 3

STATUTES, RULES AND REGULATIONS

28 U.S.C. § 1257(a) 1

U.S. Supreme Court Rule 13(1) 1

W. Va. Code § 3-8-11(c) 7

W. Va. R. App. P. 3 8

W. Va. R. App. P. 29(g) 9

MISCELLANEOUS

Annenberg Public Policy Center, *Issue Advertising in the 1999-2000 Election Cycle* (Feb. 1, 2001) 26

Brennan Center for Justice, *Buying Time 2000: Television Advertising in the 2000 Federal Elections* (2002) 26

Kathleen Hall Jamieson, *Everything You Think You Know About Politics . . . And Why You're Wrong* (2000) 27

Warren Communications News, *Television & Cable Fact Book* (2001) 26, 27

W. Va. J. Hse. of Del. 1624-25 (Mar. 10, 1989) 6

W. Va. J. Hse. of Del. 545-46, 638, 665-67 (Feb. 11, 1986) 6

W. Va. J. of the Senate 3 (Mar. 8, 1991) 6

W. Va. J. of the Senate 150-51 (Jan. 24, 1991) 6

W. Va. J. of the Senate 481-82 (Feb. 15, 1990) 6

W. Va. Senate Bill 531, Comm. Print 89R1025 (Mar. 20, 1989) 6

PETITION FOR A WRIT OF CERTIORARI

The Republican National Committee ("RNC") respectfully petitions this Court for a Writ of Certiorari to review a decision of the West Virginia Supreme Court of Appeals.

OPINIONS BELOW

The decision of the West Virginia Supreme Court of Appeals is reported at 557 S.E.2d 853. Appendix ("App.") 1a. The earlier ruling of the Circuit Court of Fayette County, West Virginia, entering summary judgment on behalf of the RNC is unpublished but appended hereto. App. 24a.

JURISDICTION

The decision that is the subject of this Petition was entered on December 12, 2001, and this Petition is timely filed. S. Ct. Rule 13(1). The Supreme Court of Appeals rendered a judgment involving an issue of central importance to defamation suits brought by public figures: the appellate court's duty, in reviewing a defamation suit, to conduct its own "independent review" to assure that the record contains clear and convincing evidence of actual malice, before allowing the suit to proceed to trial. This issue implicates the First Amendment, as applied to the States by way of the Fourteenth Amendment. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

If not reversed, the trial court's entry of summary judgment would have ended this litigation. Similarly, resolution by this Court of the issue presented in the manner advocated by the RNC will end this litigation. Moreover, the availability and proper use of summary judgment is especially important in defamation cases because the very threat of a burdensome, expensive, and uncertain jury trial in a defamation case has a propensity to suppress speech. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). The likely effect of denying this Petition would be to chill the

exercise of First Amendment rights by the RNC and all other political speakers in West Virginia until the Supreme Court of Appeals' erroneous view of summary judgment in defamation cases is ultimately corrected by this Court.

This is a case in which "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action" *and* refusal of immediate review by this Court "might seriously erode federal policy." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975) (exercising jurisdiction over Georgia Supreme Court decision that reversed summary judgment and remanded for trial after upholding "rape shield" law against First and Fourteenth Amendment challenge). Because respondent here has identified no evidence of actual malice by the RNC, a reversal of the judgment would result in a reinstatement of summary judgment on all of respondent's claims, and thus preclude further litigation. Moreover, a refusal of immediate review by this Court would "seriously erode" the federal policy of protecting core political speech, "an area of the most fundamental First Amendment activities." *Buckley v. Valeo,* 424 U.S. 1, 14-15 (1976). Indeed, this Court has observed that "[a]djudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits an exception to the general finality rule." *Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46, 55 (1989).

This Court exercised jurisdiction in a similar procedural setting in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). There, a candidate for public office sued a newspaper for violating a state statute that purportedly guaranteed him a right of reply to an editorial. The trial court invalidated the statute on First Amendment grounds, but the Florida Supreme Court reversed and remanded for trial. This Court exercised jurisdiction, ruling that "it would be intolerable to leave unanswered" an

important First Amendment question pending a trial because "an uneasy and unsettled constitutional posture" can only harm free speech. *Id.* at 247 n.6. *See also Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) (discussed below at pages 16-18). That conclusion applies equally here. The threat to the First Amendment rights of political speakers posed by the decision below supports review by this Court. *See Cox*, 420 U.S. at 485-86 (refusing to delay "final decision of the First Amendment claim until after trial").[1]

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. Const. amend. I.

STATEMENT OF THE CASE

This case strikes at the heart of the First Amendment. In reversing the trial court's entry of summary judgment on the defamation claims of respondent Charlotte Pritt, the Supreme Court of Appeals misunderstood or ignored the

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[1] Without addressing the basis for jurisdiction, this Court granted certiorari in a procedural posture similar to this case in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). There, the Pennsylvania Supreme Court reversed a judgment against a private figure plaintiff's defamation claims because the trial court did not give a statutory jury instruction imposing on defendant the burden of proving its statements were true. *Id.* at 771. Although the Pennsylvania Supreme Court remanded for a new trial, this Court granted certiorari and *reversed*, ruling that plaintiffs bear the burden of proving falseness. *Id.* at 777. In relevant part, the Court observed that the "common-law presumption" embodied in the disputed jury instruction would impose a "chilling effect" on defamation defendants that is "antithetical to the First Amendment." *Id.* As discussed herein, analogous constitutional problems also infect the decision of the West Virginia court.

strict constitutional requirements governing its review. Although this Court has repeatedly ruled in public figure defamation cases that the First Amendment requires an independent appellate determination of whether plaintiff adduced clear and convincing evidence of actual malice, here the Supreme Court of Appeals *failed* to conduct an independent review of the record and *failed* to apply the "clear and convincing" standard with respect to actual malice. For these reasons, the decision below contravenes settled First Amendment law, conflicts with rulings from the vast majority of state courts and federal courts of appeals, and threatens to stifle core political speech throughout the State of West Virginia and adjacent States.

The Facts Giving Rise to this Case

Respondent Charlotte Pritt served in the West Virginia House of Delegates from 1985 to 1989 and in the State Senate from 1989 to 1993. Ms. Pritt ran unsuccessfully for the office of Governor of West Virginia in 1992 and 1996. She admits to being a "public figure" for purposes of this case. App. 9a.

In 1992, Ms. Pritt lost the Democratic gubernatorial nomination to the incumbent, Gaston Caperton, who aired advertisements criticizing a number of her votes as a state legislator. During her 1996 gubernatorial primary campaign, Ms. Pritt again faced advertisements aired by her opponent, State Senator Joseph Manchin, criticizing those same votes in the state legislature. Ms. Pritt won the Democratic nomination for Governor on May 7, 1996, and faced Republican Cecil Underwood in the general election. App. 6a-7a.

From October 24 until Election Day, the West Virginia State Victory Committee ("Victory Committee") aired radio and television advertisements commenting, again, on the *same votes* that Ms. Pritt's Democratic opponents had

criticized during the 1992 and 1996 gubernatorial primary campaigns. These advertisements were paid for by the National Republican Senatorial Committee ("NRSC"), which, in compliance with state law, had created the Victory Committee as the formal sponsor of the spots.[2]

The television advertisement stated (App. 37a):

> Behind Charlotte Pritt's campaign smile is a liberal voting record she can't hide from. In the State Senate, Charlotte Pritt proposed teaching first graders about condoms. Surprised? You shouldn't be. Senator Pritt also voted to permit the sale of pornographic videos to children. She even voted to allow convicted drug abusers to work in our public schools. Look behind the smile. Charlotte Pritt. Wrong on the issues. Wrong for West Virginia.

The radio advertisement stated (App. 6a):

> Behind Charlotte Pritt's campaign smile is a liberal voting record she can't hide from. In the State Senate, Charlotte Pritt proposed teaching first graders about condoms. Surprised? You shouldn't be. Senator Pritt also voted to permit the sale of pornographic videos to children. She even voted to allow convicted drug abusers to work in our public schools. If parents can't trust Charlotte Pritt to protect our children, think also of our veterans. Charlotte Pritt voted against honoring the men and women of West Virginia who fought in the Gulf War. Senator Pritt voted to allow the burning of the American Flag that our veterans fought so hard to

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[2] The RNC neither created nor sponsored the advertisements about Ms. Pritt, and neither the trial court nor the Supreme Court of Appeals considered whether the RNC was a proper defendant.

> defend. She even opposed requiring students to begin their day with the Pledge of Allegiance. Look behind the smile. Charlotte Pritt. Wrong on the issues. Wrong for West Virginia.

The statements in the advertisements were based on Ms. Pritt's voting record as a West Virginia state legislator.[3] Ms. Pritt lost the gubernatorial election.

Proceedings in the Trial Court

On October 31, 1997, Ms. Pritt filed her initial Complaint, which she amended on October 26, 1998. The Amended Complaint asserted four causes of action against the RNC, the NRSC, and the Victory Committee (collectively, "the Committees"). App. 26a. Count I alleged that the Committees defamed Ms. Pritt through certain statements in the advertisements described above. Count II alleged that through these statements the Committees

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[3] The Committees contended, and the trial court found, that the advertisements were true. The Supreme Court of Appeals did not address this issue. Ms. Pritt: (1) sponsored a bill requiring public schools to teach students from kindergarten through the twelfth grade about "contraception" (W. Va. Senate Bill 531, Comm. Print 89R1025, Mar. 20, 1989); (2) voted against an amendment banning the sale of "X"-rated videotapes to minors (*W. Va. J. of the Senate* 481-82, Feb. 15, 1990); (3) voted against an amendment banning public schools from employing any person who had been convicted of the use or possession of controlled substances (*W. Va. J. Hse. of Del.* 1624-25, Mar. 10, 1989); (4) voted against a Resolution to "honor" West Virginians "serving America in Operation Desert Storm" (*W. Va. J. of the Senate* 150-51, Jan. 24, 1991); (5) voted against a Resolution urging a federal constitutional amendment to ban flag-burning (*W. Va. J. of the Senate* 3, Mar. 8, 1991); and (6) voted against a bill requiring students to recite the Pledge of Allegiance in the public schools unless they opted out of the ceremony (*W. Va. J. Hse. of Del.* 545-46, 638, 665-67, Feb. 11, 1986).

violated W. Va. Code § 3-8-11(c), which imposes criminal penalties for the publication of known falsehoods about a candidate for public office. Count III asserted that two of the statements were defamatory *per se*. Count IV asserted a claim for "false light" invasion of privacy. Ms. Pritt demanded $2 million in compensatory damages and $10 million in punitive damages.

Discovery closed as scheduled on May 15, 1999, with Ms. Pritt making *no effort* to depose any representative of the Committees. On June 15, 1999, the Committees filed a joint motion for summary judgment. The Committees contended that all four Counts of the Amended Complaint were barred because each of the statements at issue was either true or editorial opinion, and because the record contained no evidence of actual malice – that is, that the Committees published the advertisements with knowledge that they were false or with a "reckless disregard" for whether they were false or not. *New York Times*, 376 U.S. at 279-80.[4]

On May 15, 2000, after hearing argument on the motion, the trial court granted the Committees' motion for summary judgment. In part, the trial court ruled:

> As a former state legislator and candidate for the office of Governor, plaintiff is a "public figure" for purposes of this lawsuit. . . .

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[4] The Committees also contended that: (1) all four Counts were barred by a one-year statute of limitations; (2) Count II was barred because W. Va. Code § 3-8-11(c) is a criminal provision with no private right of action; (3) Count IV was barred because the statements at issue involved a public figure and matters of public interest, and were not subject to a "false light" claim; and (4) Ms. Pritt could not prove causation of any injury. The trial court's rulings on falseness and actual malice were dispositive, so it did not decide these other issues. App. 28a n.1. Neither did the Supreme Court of Appeals.

> As a public figure, plaintiff must prove by "clear and convincing evidence" that the statements at issue were both false and published with "actual malice" – that defendants had "knowledge at the time of publication that they were false" or published them with "reckless and willful disregard for the truth.". . .
>
> Summary judgment on all four Counts is warranted because the statements at issue are not false. Defendants analyzed the legislative record and explained at length why all but one of the statements at issue are true, and why the last one is a protected expression of opinion. . . . In particular, defendants set forth plaintiff's legislative votes that supported each statement and countered the interpretations giving rise to plaintiff's claims. . . .
>
> Summary judgment on all four Counts is also warranted because there is no record evidence that any defendant acted with "actual malice."

App. 26a-27a. Ms. Pritt sought reconsideration, which was denied on June 13, 2000. App. 29a.

Proceedings in the Supreme Court of Appeals

On appeal,[5] Ms. Pritt presented several arguments, but only her challenge to the trial court's disposition of the actual malice issue is pertinent to this Petition. Since each of Ms. Pritt's claims is based upon the very same advertisements as her defamation claim, the trial court correctly ruled, and the Supreme Court of Appeals implicitly accepted, that each

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[5] West Virginia has no intermediate appellate court, and Ms. Pritt sought direct review by the Supreme Court of Appeals by filing a petition for appeal. *See* W. Va. R. App. P. 3. She filed her amended petition on December 8, 2000, and it was granted on April 3, 2001. App. 30a.

of her claims is subject to the actual malice requirement. App. 17a-18a, 26a.

In her reply brief, Ms. Pritt set forth the following assertions as supporting a finding of actual malice:

> Evidence of malice includes, inter alia, the cloak and dagger manner in which the [West Virginia State Victory] committee was surreptitiously created just before the election, the dishonesty of the committee's self-portrayal as being sponsored and paid for by the contributions of West Virginians, the time frame just before the election when the ads were aired, providing the Appellant no legitimate opportunity to respond, the vituperative nature of the content of the ads and their obvious intent to shock the consciences of West Virginia voters with statements that were patently false; and the pattern of conduct of the Republican National Committee.

Reply Br. at 13. None of these assertions, even if proved, is sufficient to demonstrate actual malice. Ms. Pritt pointed to no evidence in the record, much less clear and convincing evidence, to demonstrate that the Committees knew or recklessly disregarded that the advertisements were false.

In its decision, the Supreme Court of Appeals focused on whether there were "genuine issues of material fact" sufficient to preclude summary judgment. App. 16a.[6] After

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[6] Three of five justices on the Supreme Court of Appeals were campaigning with Ms. Pritt at the time the advertisements at issue were airing. Only one of those three recused, and was replaced by Circuit Judge John T. Madden. App. 1a. The lower court's rules vest the decision to recuse in the unreviewable discretion of the affected justice. In the event of recusal, the Chief Justice has the unreviewable discretion to appoint any sitting trial court judge in West Virginia to sit for the case. W. Va. R. App. P. 29(g).

(continued...)

citing (App. 12a-15a) various formulations of the summary judgment standard in "run of the mill civil cases[s]," *Anderson*, 477 U.S. at 252, but none from public figure defamation cases, the court stated (App. 15a-16a):

> . . . we conclude that there are *genuine issues of material fact* so as to necessitate the presentation of this case to a jury. Unlike the circuit court, we are not firmly convinced that the factual issues herein have been finally resolved. *Specifically, before this Court, the parties repeatedly and continuously have argued the facts giving rise to the instant appeal and whether the allegedly defamatory statements were tainted with falsity or laced with malice.* When faced with such an ongoing factual dispute, and inferences that, if viewed in the nonmovant's favor, could support a verdict for the nonmovant, *we must not continue to harbor these doubts as to whether summary judgment is appropriate but*

Based on published reports, the Committees moved on July 9, 2001, to disqualify Justice Starcher because he was campaigning for election to the Supreme Court of Appeals on Ms. Pritt's campaign bus in 1996 while the disputed advertisements were airing, and had also made public comments suggesting bias in her favor in the instant case. App. 34a. By letter and order dated July 10, Justice Starcher refused to recuse. App. 32a-35a. On October 2, the day before oral argument, Justice Maynard disclosed for the first time that he had also campaigned with Ms. Pritt in 1996, and recused *sua sponte*. App. 36a. At oral argument, Justice Davis disclosed publicly for the first time that, like Justices Maynard and Starcher, she had also campaigned with Ms. Pritt in 1996. In the absence of objection by the parties, however, Justice Davis did not recuse, and eventually authored the majority opinion. For a discussion of the unique recusal policies of the West Virginia Supreme Court of Appeals, see *Dababnah v. West Virginia Board of Medicine*, 47 F. Supp.2d 734, 749-50 (S.D. W. Va. 1999).

> *rather hand the case over to a jury, in whose province such factual determinations lie.* Accordingly, we reverse the circuit court's ruling granting summary judgment to RNC. . . . (emphasis added).[7]

The "ongoing factual dispute" referred to by the Court was *not* a conflict in the evidence concerning actual malice, but the conflict between Ms. Pritt's *claim* that the record contained such evidence, and the Committees' insistence that the record contained no such evidence. Contrary to this Court's instructions, the Supreme Court of Appeals failed to conduct an "independent review" of the record to assure that it contained the requisite clear and convincing evidence of actual malice.[8] Accordingly, as we show below, the Supreme Court of Appeals selected and applied the incorrect legal precept, leading it to err as a matter of law.

Noting that "it has come to our attention that the litigation of a cause of action for defamation can prove to be a daunting task for even the most learned jurist or the most

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[7] Justices Albright and Starcher filed a concurring opinion stating that a "genuine issue of material fact" as to actual malice was created by the question of "what Appellees, or either of them, *knew or should have known* regarding the factual content and the context of the commercials." App. 22a (emphasis added). These Justices confused actual malice with negligence, which is insufficient to sustain a public figure defamation action. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991).

[8] In a footnote, the lower court alluded to deposition testimony from two state senators proffered by Ms. Pritt to demonstrate that the advertisements were false. App. 16a n.10. Neither deponent did or could speak to the Committees' alleged knowledge or recklessness. Accordingly, this proffered testimony had no bearing on the issue of actual malice.

experienced counselor," the Supreme Court of Appeals also re-stated several settled principles of defamation jurisprudence "in an attempt to clarify this nebulous area of law." App. 17a. In a footnote, the court paid lip service to one of the very principles that it ignored in deciding the case: that as a public figure Ms. Pritt was required to "resist a motion for summary judgment by showing clear and convincing evidence of actual malice." App. 20a-21a n.14. The court then erroneously disregarded this rule, asserting that it was "no longer relevant" because the case "cannot be disposed of summarily." *Id.* Thus, the court reversed the grant of summary judgment without determining whether the record contained clear and convincing evidence of actual malice.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Appeals fundamentally misunderstood or ignored its responsibilities under the First Amendment. Not only does the decision below defy the settled First Amendment jurisprudence of this Court, it also conflicts with the many state courts and federal courts of appeals that have properly fulfilled their obligations in public figure defamation cases. Unless and until corrected by this Court, the precedent below threatens to chill political speech and diminish public discourse about public figures throughout West Virginia and adjacent States. The First Amendment cannot countenance this result.

I. THE DECISION BELOW IS CONTRARY TO THIS COURT'S CLEAR RULINGS ON THE ROLE OF APPELLATE COURTS IN PUBLIC FIGURE DEFAMATION CASES.

Over the last four decades, this Court has consistently emphasized two rules imposed by the First Amendment in public figure defamation cases: (1) plaintiffs must prove by clear and convincing evidence that defamatory statements

were made with actual malice; and (2) appellate courts must independently review the factual record to determine whether such evidence exists. First set forth in *New York Times*, these rules are coextensive and mutually reinforce each other. Later, in *Anderson*, this Court confirmed that the "clear and convincing" standard of proof applies at the summary judgment stage. By failing to conduct an independent review of the record, and then holding that mere disagreement by the parties about the content of the record is sufficient to avoid summary judgment, the Supreme Court of Appeals misunderstood the unique duty of independent review in defamation cases imposed upon it by the First Amendment.

A. In Public Figure Defamation Cases, the First Amendment Requires Independent Appellate Review To Assure That the Record Contains Clear and Convincing Evidence of Actual Malice.

This Court established the bedrock First Amendment requirement of actual malice in *New York Times*. There, a public official alleged that he was injured by inaccurate statements in an advertisement published by the New York Times newspaper. Although falseness was "uncontroverted," 376 U.S. at 258, this Court *reversed* a decision of the Alabama Supreme Court that upheld a jury verdict for plaintiff, and ordered entry of judgment for defendants. *Id.* at 292.

This Court's ruling was premised on its conclusion that falseness alone is not sufficient for a public official to prove libel. To the contrary, emphasizing our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," *id.* at 270, the Court ruled that "[e]rroneous statement is inevitable in free debate, and [i]t must be

protected if the freedoms of expression are to have the 'breathing space' that 'they need . . . to survive.'" *Id.* at 271-72. To secure the protections of the First Amendment, the Court required that defamation plaintiffs who are public officials must prove that a publisher made a false statement with "actual malice" – that is, with knowledge that it was false, or with a "reckless disregard" for whether it was false or not. *Id.* at 280-81. The Court further required that actual malice must be proved with "convincing clarity." *Id.* at 285-86.[9]

After setting forth the actual malice requirement, the Court in *New York Times* reviewed the evidence on this dispositive issue. As it carefully explained, the Court's independent review of the record was compelled by the same First Amendment principles that require proof of actual malice:

> This Court's duty is not limited to the elaboration of constitutional principles; *we must also in proper cases review the evidence* to make certain that those principles have been constitutionally applied. *This is such a case*, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see

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[9] This Court later extended the actual malice requirement to *all* public figure defamation plaintiffs. *See Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967) (defamation claims of university athletic director). The "clear and convincing proof" standard of proof for actual malice also applies to the defamation claims of all public figures. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

> . . . whether they are of a character which the principles of the First Amendment . . . protect.' *We must 'make an independent examination of the whole record,' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.*

Id. at 285 (citations omitted) (emphasis added).

This Court reiterated the need for "clear and convincing" proof of actual malice and an independent appellate review of the record in *Bose Corporation v. Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984). There, the district court had ruled, after a 19-day bench trial, that plaintiff had sustained its burden of proving actual malice. *Id.* at 491. The First Circuit reversed based on its own review of the factual record. *Id.* at 491-92. After a comprehensive analysis of First Amendment precedents, this Court affirmed, stating that:

> The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. . . . It reflects a deeply held conviction that *judges* – and particularly Members of this Court – *must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.* The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. *Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing evidence of 'actual malice.'*

Id. at 510-11 (emphasis added). This Court conducted its own review of the record evidence, *id.* at 511-14, and concluded that plaintiff's evidence of actual malice was not "clear and convincing." *Id.* at 513. Reiterating its basic ruling, the Court held that "[a]ppellate judges" in a case "governed by *New York Times* . . . must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." *Id.* at 514.[10]

B. The Requirement for Independent Review To Assure That the Record Contains "Clear and Convincing" Proof of Actual Malice Applies at the Summary Judgment Stage of a Public Figure Defamation Case.

This Court expressly extended the reasoning of *New York Times* and its progeny to the summary judgment setting in *Anderson*. *Anderson* came to this Court in a procedural

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[10] This Court has consistently maintained these strict requirements. In *Time, Inc. v. Pape*, 401 U.S. 279 (1971), the district court directed a verdict against a public figure's defamation claims and the court of appeals reversed because it discerned evidence of actual malice. Labeling the actual malice requirement a "constitutional rule," this Court conducted its own review of the record and concluded that the evidence of actual malice did *not* warrant a trial. *Id.* at 284-92. In *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971), a state trial court entered judgment for plaintiff on his defamation claims and the state supreme court affirmed. This Court reversed, however, after conducting an independent review "as a matter of constitutional law" and finding insufficient evidence of actual malice. *Id.* at 277. In *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), the court of appeals reviewed the trial record and affirmed a jury verdict in favor of the plaintiff, a candidate for political office. *Id.* at 662-63. Although this Court also affirmed upon its own review of the record, it noted that discussion of a candidate's qualifications presents "the strongest possible case for independent review." *Id.* at 686-87.

posture identical to this case. In *Anderson*, the district court granted summary judgment in favor of defendants in a public figure defamation action, on the ground that defendants' investigation, research, and reliance on numerous sources precluded a finding of actual malice by clear and convincing evidence. 477 U.S. at 246. The D.C. Circuit reversed and remanded, holding that the heightened evidentiary burden imposed by *New York Times* did not apply at the summary judgment stage, and concluding that its own independent review of the record demonstrated that a jury could "reasonably conclude" that actual malice was present. *Id.* at 247.

This Court *reversed* the D.C. Circuit and held that "the inquiry involved in a ruling on a motion for summary judgment . . . necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Id.* at 252. Expressly contrasting the approach to summary judgment "in a run-of-the-mill civil case" with that in a public figure defamation case "where the First Amendment mandates a 'clear and convincing' standard," *id.* at 252, the Court held that the appropriate summary judgment inquiry in a pubic figure defamation case is "whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Id.* at 255-56. The Court placed the burden of coming forward with the necessary clear and convincing proof squarely on the plaintiff, who must proffer "concrete evidence" and "specific facts" demonstrating actual malice. *Id.* at 249, 256. In view of these requirements, the Court

remanded the case for application of the "clear and convincing" standard of proof. *Id.* at 257.[11]

C. The Supreme Court of Appeals Failed To Review the Record and Failed To Apply the "Clear And Convincing" Standard of Proof for Actual Malice.

Despite the clear weight of this Court's decisions, the Supreme Court of Appeals misunderstood its duty of independent review of the record. Glaringly, the lower court, like Ms. Pritt, failed to identify any "concrete evidence" or "specific facts" pertinent to the question whether defendants knew the challenged statements were false, or recklessly disregarded the falseness of those statements. The court's failure to recite any such evidence is fully explained by its observation that "before this Court, the parties repeatedly and continuously have argued the facts . . . whether the allegedly defamatory statements were . . . laced with actual malice." App. 15a. Rather than "continue to harbor these doubts about whether summary judgment is appropriate," the lower court should have simply examined the record; by failing to do so, it defaulted on its duty of independent review by "hand[ing] the case over to a jury." App. 15a. Under the lower court's reasoning, any unsubstantiated claim by a defamation plaintiff regarding the content of the record would preclude summary judgment and require a

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[11] This Court reaffirmed the central holding of *Anderson* in *Masson*. There, the trial court granted defendants summary judgment in a public figure defamation action, and, after an extensive review of the record, the court of appeals affirmed. *Masson*, 501 U.S. at 508-09. This Court conducted its own review of the record, *id.* at 521-25, however, and reversed, ruling that there was "sufficient additional evidence . . . [which] would support a jury determination under a clear and convincing standard" that actual malice was present. *Id.* at 521.

burdensome, expensive, and uncertain trial. Indeed, because a directed verdict motion poses the same essential questions as a summary judgment motion, *Anderson*, 477 U.S. at 250-51, the lower court has virtually guaranteed that public figure defamation cases in West Virginia courts must proceed all the way to verdict. The Supreme Court of Appeals was plainly wrong. *See Anderson*, 477 U.S. at 255-56; *Bose*, 466 U.S. at 511; *New York Times*, 376 U.S. at 285.

The Supreme Court of Appeals also failed to apply the "clear and convincing" standard to Ms. Pritt's allegation of actual malice. Although the court recognized the general applicability of this heightened standard of proof, it deemed the standard "no longer relevant" because the case "cannot be disposed of summarily." App. 20a n.14. This conclusion is precisely *backwards*, because the decision that summary judgment was inappropriate should have been based on the presence of clear and convincing evidence of actual malice. *See Anderson*, 477 U.S. at 252, 256; *Masson*, 501 U.S. at 521. Because the court failed to conduct the requisite independent review of the record for evidence of actual malice, its conclusion that the case "cannot be disposed of summarily" was premature, unsupported by evidence, and incorrect as a matter of law.

II. THE DECISION BELOW CONFLICTS WITH RULINGS FROM THE VAST MAJORITY OF STATE COURTS AND FEDERAL COURTS OF APPEALS.

In view of the extraordinary burdens that erroneous lower court decisions can impose on constitutionally-protected speech, this Court has granted certiorari, even without conflicts among the circuits or state courts of last resort, to assure that First Amendment limits are respected. *See, e.g., Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 565-66 (1977) (granting certiorari to review Ohio Supreme Court ruling on the First Amendment implications

of state law "right of publicity," despite absence of conflicts among the lower courts); *Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler*, 398 U.S. 6, 8 (1970) (same, to review Maryland Court of Appeals ruling on "actual malice" jury instruction; "We granted certiorari to consider the constitutional issues presented."). The decision below presents an *a fortiori* case for exercise of this Court's certiorari jurisdiction because, in addition to its tendency to suppress core political speech (*see* Part III below), it squarely conflicts with rulings from most state courts of last resort and federal courts of appeals.

The majority of state high courts have respected and shouldered their duty of independent appellate review to enforce the need for "clear and convincing" proof of actual malice in public figure defamation cases. For example, in *Guilford Transportation Industries, Inc. v. Wilner*, 760 A.2d 580 (D.C. 2000), the District of Columbia Court of Appeals affirmed the trial court's entry of summary judgment against the defamation claims of a public figure. The court ruled, in particular, that the First Amendment required it to "make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* at 593 (quotation omitted). As part of its examination, the court set out the facts underlying plaintiff's allegations of actual malice and concluded that those allegations were not supported by clear and convincing evidence. *Id.* at 583-87.

Similarly, in *Journal-Gazette Company, Inc. v. Bandido's, Inc.*, 712 N.E.2d 446 (Ind.), *cert. denied*, 528 U.S. 1005 (1999), the trial court entered summary judgment against a public figure plaintiff's defamation claims, the intermediate appellate court reversed and remanded for trial, and the Indiana Supreme Court reversed and reinstated summary judgment. In rendering its decision, the state supreme court held that it is bound to use an "independent examination of the whole record as the standard of review

when proof of actual malice is required as a matter of federal constitutional law in defamation cases." *Id.* at 455-56. After reciting the pertinent facts, the court concluded that the evidence of actual malice was not clear and convincing. *Id.* at 456-69.

The West Virginia court conducted no such review in this case. Indeed, the decision below sets out no facts bearing on actual malice but merely seizes upon the parties' disagreement about whether the record contains sufficient evidence to preclude summary judgment, and then asserts that the "clear and convincing" standard does not apply because unidentified "issues of material fact" preclude summary judgment. App. 15a, 20a n.14. The decision below therefore conflicts with this Court's decisions in *New York Times*, *Anderson*, and *Bose*, as well as *Guilford*, *Journal-Gazette*, and many other state court decisions.[12]

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[12] *See, e.g., Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 120 (Tex. 2000) ("It is not enough for us . . . to determine that a reasonable jury could have found that [defendant] acted with actual malice. Beyond that, we ourselves must conclude that the evidence of malice is clear and convincing."); *Fitzgerald v. Tucker*, 737 So.2d 706, 716 (La. 1999) ("[O]ur scope of review is to examine in depth the 'statements in issue' and the 'circumstances under which they were made,' and to 're-examine the evidentiary basis' of the lower court decision in the light of the Constitution."). *Accord Pemberton v. Birmingham News Co.*, 482 So.2d 257, 260 (Ala. 1985); *Dombey v. Phoenix Newspapers, Inc.*, 724 P.2d 562, 572 (Ariz. 1986); *Thomson Newspaper Publ'g, Inc. v. Coody*, 896 S.W.2d 897, 901 (Ark.), *cert. denied*, 516 U.S. 1008 (1995); *McCoy v. Hearst Corp.*, 727 P.2d 711, 715-16 (Cal. 1986) (in bank), *cert. denied*, 481 U.S. 1041 (1987); *DiLeo v. Koltnow*, 613 P.2d 318, 323-24 (Colo. 1980) (en banc); *Kanaga v. Gannett Co., Inc.*, 687 A.2d 173, 176 (Del. 1996); *Wiemer v. Rankin*, 790 P.2d 347, 357 (Idaho 1990); *Wanless v. Rothballer*, 503 N.E.2d 316, 320 (Ill.), *cert. denied*, 482 U.S. 929 (1987); *Carr v. Bankers Trust Co.*, 546 N.W.2d 901, 904-05 (Iowa 1996); *Tucci* (continued...)

Also in contrast to the court below, the federal courts of appeals have applied this Court's public figure defamation requirements correctly. For example, in *Secrist v. Harkin*, 874 F.2d 1244 (8th Cir.), *cert. denied*, 493 U.S. 933 (1989), the Eighth Circuit affirmed the district court's entry of summary judgment against a public figure plaintiff's defamation claims. *Id.* at 1253. In evaluating whether summary judgment was properly granted, the court of appeals ruled that it was "obliged to make [its] own independent review of the record to ensure the principles of actual malice are constitutionally applied." *Id.* at 1251. The court set out and carefully reviewed the evidence, which it determined would *not* "support a jury finding that [plaintiff]

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v. Guy Gannett Publ'g Co., 464 A.2d 161, 167 (Me. 1983); *Chesapeake Publ'g Corp. v. Williams*, 661 A.2d 1169, 1176 (Md. 1995); *McAvoy v. Shufrin*, 518 N.E.2d 513, 516 (Mass. 1988); *Rouch v. Enquirer & News of Battlecreek Michigan*, 487 N.W.2d 205, 212 (Mich. 1992), *cert. denied*, 507 U.S. 967 (1993); *Diesen v. Hessburg*, 455 N.W.2d 446, 452 (Minn. 1990), *cert. denied*, 498 U.S. 1119 (1991); *Gulf Publ'g Co., Inc. v. Lee*, 434 So.2d 687, 696 (Miss. 1983); *Deaver v. Hinel*, 391 N.W.2d 128, 131 (Neb. 1986); *Turf Lawnmower Repair, Inc. v. Bergen Record Corp.*, 655 A.2d 417, 423 (N.J. 1995), *cert. denied*, 516 U.S. 1066 (1996); *Mahoney v. Adirondack Publ'g Co.*, 517 N.E.2d 1365, 1369 (N.Y. 1987); *Dale v. Ohio Civil Serv. Employees Ass'n*, 567 N.E.2d 253, 255 (Ohio), *cert. denied*, 501 U.S. 1231 (1991); *Herbert v. Oklahoma Christian Coalition*, 992 P.2d 322, 328 (Okla. 2000); *Lyons v. Rhode Island Pub. Employees Council*, 559 A.2d 130, 134-35 (R.I.), *cert. denied*, 493 U.S. 892 (1989); *Peeler v. Spartan Radiocasting, Inc.*, 478 S.E.2d 282, 284 (S.C. 1996), *cert. denied*, 520 U.S. 1275 (1997); *Margoles v. Hubbart*, 760 P.2d 324, 326 & n.6 (Wash. 1988) (en banc); *Torgerson v. Journal/Sentinel, Inc.*, 563 N.W.2d 472, 478-79 (Wisc. 1997); *MacGuire v. Harriscope Broad. Co.*, 612 P.2d 830, 833 (Wyo. 1983). *But see Miami Herald Publ'g Co. v. Ane*, 458 So.2d 239, 242 (Fla. 1984) (purporting to apply rule of independent review, but describing no evidence).

has shown with convincing clarity that a defendant acted with actual malice." *Id.* at 1252.

The D.C. Circuit applied the same level of scrutiny in *Liberty Lobby, Inc. v. Rees*, 852 F.2d 595 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1010 (1989), in which it also affirmed entry of summary judgment against a public figure plaintiff's defamation claims. After the court conducted a "thorough review of the record" and set forth the evidence, it determined that plaintiff had failed to prove actual malice by clear and convincing evidence. *Id.* at 601.

As noted above, the West Virginia court conducted no factual review and failed to apply the proper evidentiary standard. The decision below therefore conflicts with *Secrist* and *Liberty Lobby*, along with rulings from nearly all other federal courts of appeals.[13]

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[13] *See, e.g., Cobb v. Time, Inc.*, No. 00-5159, 2002 WL 112477, at *7 (6th Cir. Jan. 30, 2002) ("The unique nature of the interest protected by the actual malice standard requires that reviewing courts conduct an independent review to determine whether that standard has been met."); *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 127 (1st Cir. 1997) ("appellate judges must conduct a whole-record review"); *Newton v. NBC, Inc.*, 930 F.2d 662, 669, 672 (9th Cir.) (it "is necessary to state in some detail the evidence on the actual malice issue" in order to review evidence "with the searching care required to protect First Amendment values"), *cert. denied*, 502 U.S. 866 (1991). *Accord Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1241 (11th Cir. 1999), *cert. denied*, 528 U.S. 1198 (2000); *Anderson v. McCotter*, 100 F.3d 723, 725 (10th Cir. 1996); *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 708, 714-15 (4th Cir.) (en banc), *cert. denied*, 501 U.S. 1212 (1991); *Contemporary Mission, Inc. v. New York Times Co.*, 842 F.2d 612, 622 (2d Cir.), *cert. denied*, 488 U.S. 856 (1988); *Bartimo v. Horsemen's Benevolent & Protective Ass'n*, 771 F.2d 894, 898 (5th Cir. 1985), *cert. denied*, 475 U.S. 1119 (1986); *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1088 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985).

III. IF NOT CORRECTED, THE DECISION BELOW WILL HAVE PROFOUND CONSEQUENCES FOR POLITICAL SPEECH IN WEST VIRGINIA AND ADJACENT STATES.

Unless and until corrected, the Supreme Court of Appeals' decision will have an immediate and far-reaching impact well beyond the parties to this case. With trial now scheduled for June 2003, and inevitable appeals lasting for years thereafter, two and perhaps three federal and state election cycles will run their course in West Virginia before this Court might have another opportunity to correct the lower court's error. Perhaps ironically, if the Committees prevail at trial, the Supreme Court of Appeals' erroneous view of summary judgment in defamation cases may evade correction indefinitely. For however long the lower court decision remains good law, it will engender a coercive threat of defamation litigation, not terminable by summary judgment even in wholly meritless cases, that will chill free and open political debate.

For decades, this Court has repeatedly recognized that the First Amendment guarantee of free speech "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co.*, 401 U.S. at 272.[14] This is particularly true for the type of

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[14] *See also Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996) (political speech is "core First Amendment activity"); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (political speech is an "area of the most fundamental First Amendment activities" entitled to the "broadest protection"); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (a "major purpose" of the First Amendment is to "protect the free discussion of governmental affairs"); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (the "opportunity for free political discussion" is a "fundamental principle of our constitutional system").

candidate-focused speech at issue in this case because "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." *Eu v. San Francisco Cty. Democratic Cen. Comm.*, 489 U.S. 214, 223 (1989) (quotation omitted). And, of course, nothing in the lower court's opinion limits its erroneous view of defamation summary judgment procedure to cases arising out of political contests; it is equally applicable to any defamation suit brought by any public figure.

The decision below, if not corrected, threatens to undermine bedrock First Amendment principles. Put simply, speakers in West Virginia are now much more likely to face burdensome, costly, and uncertain jury trials as a result of any speech that is critical of public figures. By thus weakening summary judgment procedures in these cases, the lower court has dramatically increased the probability of protracted litigation concerning political speech. As this Court has repeatedly recognized, speakers will doubtless respond by curtailing their criticism of public figures, thereby depriving voters of information that is vital to our system of self-government. This is precisely what the actual malice requirement was designed to prevent.

This danger is not limited to political party committees such as the RNC. To the contrary, the decision below threatens to unleash a torrent of litigation against *all* those who engage in political speech. Newspapers and broadcast media outlets that criticize public officials or candidates for office, independent groups, and candidates themselves who may speak harshly of their opponents during the rough-and-tumble of campaigning, are equally vulnerable to trials for their political speech under West Virginia's new regime.

The consequences of self-censorship are brought into stark relief by the important role that political advertising

plays in our Nation's electoral process. Political advertisements are the "prime method for communicating with voters in geographically large districts and as such are potent tools for changing minds and ultimately winning elections." Brennan Center for Justice, *Buying Time 2000: Television Advertising in the 2000 Federal Elections* 13 (2002). Reflecting their unsurpassed importance, a huge number of political advertisements are published in each biennial election cycle. During the 1999-2000 cycle, for example, 3,327 unique political spots aired on television in federal, gubernatorial, and judicial elections in the Nation's top 75 media markets alone, *id.* at 29, of which 4 reach into West Virginia. Warren Communications News, *Television & Cable Fact Book* A-1364 (2001). These advertisements aired a total of 940,755 times, at a cost of over $672 million. *Buying Time* at 29. Although representing only a fraction of the political advertising that occurs each year, these totals illustrate the potentially profound impact of the decision below.

This impact will be particularly onerous for non-party entities, which are responsible for a substantial amount of political speech in the United States. For example, approximately $347 million of the estimated $509 million spent nationwide on "issue advocacy" advertisements during the 1999-2000 election cycle was spent by groups *other than* Republican and Democratic party organizations.[15] Annenberg Public Policy Center, *Issue Advertising in the 1999-2000 Election Cycle* 4-5 (Feb. 1, 2001). In view of the decision below, each of these groups, along with the media and candidates themselves, face the same dilemma in West

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[15] "Issue advocacy" is a term used for political speech that does not expressly advocate the election or defeat of an identified candidate. *See generally Buckley*, 424 U.S. at 44 & n.52.

Virginia: either limit the exercise of core political speech or prepare to defend against protracted litigation by plaintiffs whose ability to proceed to trial has been greatly (and unconstitutionally) enhanced. This dilemma is antithetical to the First Amendment. *Philadelphia Newspapers*, 475 U.S. at 777.

Speech that is most subject to defamation litigation is, in the view of one respected observer, quite helpful and informative to voters. "[N]egative advertisements actually contain *more* relevant issue content than ads containing no information about the sponsor's opposing candidate." Kathleen Hall Jamieson, *Everything You Think You Know About Politics . . . And Why You're Wrong* 104 (2000) (emphasis added). Therefore, suppression of such speech not only offends the First Amendment; it also will deprive the public of valuable information about candidates.

It is also worth noting that the chilling effect of the lower court's decision is not confined to West Virginia. The Washington, D.C., Pittsburgh, Pennsylvania, Roanoke, Virginia, and other, smaller out-of-state media markets also play into West Virginia. *See Television & Cable Fact Book* A-1364. News reports of public officials' activities, as well as political debate, in these markets may well be subjected to defamation litigation in West Virginia courts.

In sum, by permitting defamation cases brought by plaintiffs such as Ms. Pritt to proceed to trial without clear and convincing proof of actual malice, the Supreme Court of Appeals has stripped away a layer of First Amendment protection that is crucial to the public discussion of political issues. Instead of securing the widest dissemination of information, the decision below threatens to mute many political speakers, hindering the speech that is most "integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14.

CONCLUSION

For the reasons stated above, petitioner Republican National Committee respectfully urges this Court to grant this Petition.

Respectfully submitted,

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March 7, 2002

TABLE OF CONTENTS

Page

December 12, 2001, Opinion of the Supreme Court Of Appeals of West Virginia 1a

May 15, 2000, Letter and Order of Circuit Court of Fayette County, West Virginia Granting Summary Judgment 24a

June 13, 2000, Order of Circuit Court of Fayette County, West Virginia Denying Motion for Reconsideration 29a

April 3, 2001, Order of Supreme Court of Appeals Of West Virginia Granting Motion to File Amended Petition for Appeal 30a

July 10, 2001, Notification by Supreme Court of Appeals Of West Virginia of Justice Starcher's Refusal to Voluntarily Recuse Himself 32a

July 10, 2001, Letter of Justice Starcher to Clerk of The Supreme Court of Appeals of West Virginia 34a

October 2, 2001, Notification by Supreme Court of Appeals of West Virginia of Justice Maynard's Voluntary Recusal 36a

David Welch Associates, Text of Television Advertisement Aired by the Committees 37a

IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

September 2001 Term

No. 29326

CHARLOTTE PRITT,
Plaintiff Below, Appellant,

v.

THE REPUBLICAN NATIONAL COMMITTEE, ET AL.,
Defendants Below, Appellees.

Appeal from the Circuit Court of Fayette County
Honorable Charles M. Vickers, Judge
Civil Action No. 97-C-380(V)

REVERSED AND REMANDED

Submitted: October 3, 2001
Filed: December 12, 2001

JUSTICE DAVIS delivered the Opinion of the Court.

JUSTICE MAYNARD, deeming himself disqualified, did not participate in the decision of this case.

JUDGE MADDEN, sitting by temporary assignment.

JUSTICE ALBRIGHT concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "A circuit court's entry of summary judgment is reviewed *de novo*." Syllabus point 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

2. "When a party filing a motion for reconsideration does not indicate under which West Virginia Rule of Civil Procedure it is filing the motion, the motion will be considered to be either a Rule 59(e) motion to alter or amend a judgment or a Rule 60(b) motion for relief from a judgment order. If the motion is filed within ten days of the circuit court's entry of judgment, the motion is treated as a motion to alter or amend under Rule 59(e). If the motion is filed outside the ten-day limit, it can only be addressed under Rule 60(b)." Syllabus point 2, *Powderidge Unit Owners Association v. Highland Properties, Ltd.*, 196 W. Va. 692, 474 S.E.2d 872 (1996).

3. "The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed." Syllabus point 1, *Wickland v. American Travellers Life Insurance Co.*, 204 W. Va. 430, 513 S.E.2d 657 (1998).

4. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992)." Syllabus point 1, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

5. "Roughly stated, a "genuine issue" for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed "material" facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law. *Syl. Pt. 5, Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995)." Syllabus point 2, *Tolliver v. Kroger Co.*, 201 W. Va. 509, 498 S.E.2d 702 (1997).

6. "A candidate for political office is governed by the same rules with regard to recovery for libel as a public official and can sustain an action for libel only if he can prove that: (1) the alleged libelous statements were false or misleading; (2) the statements tended to defame the plaintiff and reflect shame, contumely, and disgrace upon him; (3) the statements were published with knowledge at the time of publication that they were false or misleading or were published with a reckless and willful disregard of truth; and, (4) the publisher intended to injure the plaintiff through the knowing or reckless publication of the alleged libelous material." Syllabus point 1, *Sprouse v. Clay Communication, Inc.*, 158 W. Va. 427, 211 S.E.2d 674 (1975).

7. "In order for a public official or a candidate for public office to recover in a libel action, the plaintiff must prove that: (1) there was the publication of a defamatory statement of fact or a statement in the form of an opinion that implied the allegation of undisclosed defamatory facts as the basis for the opinion; (2) the stated or implied facts were false; and, (3) the person who uttered the defamatory statement either knew the statement was false or knew that he was publishing the statement in reckless disregard of whether the statement was false." Syllabus point 1, *Hinerman v. Daily Gazette Co., Inc.*, 188 W. Va. 157, 423 S.E.2d 560 (1992).

8. "A court must decide initially whether as a matter of law the challenged statements in a defamation action are capable of a defamatory meaning." Syllabus point 6, *Long v. Egnor*, 176 W. Va. 628, 346 S.E.2d 778 (1986).

9. "A statement of opinion which does not contain a provably false assertion of fact is entitled to full constitutional protection." Syllabus point 4, *Maynard v. Daily Gazette Co.*, 191 W. Va. 601, 447 S.E.2d 293 (1994).

10. "[W]hether a statement is one of fact or opinion is an issue that must be decided initially by a court." Syllabus point 7, in part, *Long v. Egnor*, 176 W. Va. 628, 346 S.E.2d 778 (1986).

11. "Plaintiffs who are public officials or public figures must prove by clear and convincing evidence that the defendants made their defamatory statement with knowledge that it was false or with reckless disregard of whether it was false or not." Syllabus point 2, in part, *State ex rel. Suriano v. Gaughan*, 198 W. Va. 339, 480 S.E.2d 548 (1996).

12. In order for a public official or a candidate for public office to recover in a libel action, he/she must prove by clear and convincing evidence that the stated or implied facts were false.

DAVIS, Justice.

The appellant herein and plaintiff below, Charlotte Pritt [hereinafter referred to as "Ms. Pritt"], appeals from orders entered May 15, 2000, and June 13, 2000, by the Circuit Court of Fayette County. In the first order, the circuit court granted summary judgment for the appellees herein and defendants below, the Republican National Committee, *et al.*

[hereinafter collectively referred to as "RNC"],[1] concluding that statements made in advertisements sponsored by RNC during the 1996 West Virginia Gubernatorial race were not false or published with actual malice as alleged by Ms. Pritt. The circuit court's second order denied Ms. Pritt's "motion for reconsideration." On appeal to this Court, Ms. Pritt assigns numerous errors, including (1) summary judgment was not proper because there existed a genuine issue of material fact; (2) the circuit court failed to determine whether the statements in issue were defamatory; (3) deposition testimony was erroneously excluded; and (4) in rendering its decision, the circuit court neglected to address the remaining counts asserted in her amended complaint. Upon a review of the parties' arguments, the record submitted for appellate review, and the pertinent authorities, we agree with Ms. Pritt that genuine issues of material fact do preclude the disposition of this matter by summary judgment. Accordingly, we reverse the circuit court's ruling to the contrary, and remand this case for further proceedings consistent with this Opinion.

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[1] In her complaint, Ms. Pritt named multiple defendants: the National Republican Senatorial Committee, the West Virginia State Victory Committee, John Doe, Jane Doe, and the appellee named herein, the National Republican Committee, a.k.a. the National Republican Party. For ease of reference, and to maintain consistency with the circuit court's order underlying the instant appeal, we will collectively refer to these defendants below, who are also appellees herein, as the Republican National Committee, or "RNC," except where designation of specific parties is warranted.

I.

FACTUAL AND PROCEDURAL HISTORY

In 1996, Ms. Pritt, a former West Virginia schoolteacher and state legislator, was the Democratic party's candidate for the office of Governor of the State of West Virginia. During the month immediately preceding the general election, the National Republican Senatorial Committee [hereinafter referred to as "NRSC"] formally organized the West Virginia State Victory Committee [hereinafter referred to as "Victory Committee"] pursuant to the election laws of this State. *See generally* W. Va. Code § 3-8-1, *et seq*. Among other activities, the Victory Committee sponsored and published numerous radio and television advertisements, during the final weeks of the campaign, which called into question Ms. Pritt's character and campaign platform. One of these radio spots specifically charged:

> Behind Charlotte Pritt's campaign smile is a liberal voting record she can't hide from.
>
> In the State Senate, Charlotte Pritt proposed teaching first graders about condoms.
>
> Surprised? You shouldn't be.
>
> Senator Pritt also voted to permit the sale of pornographic Videos to children.
>
> She even voted to allow convicted drug abusers to work in our public schools.
>
> If parents can't trust Charlotte Pritt to protect our children, think also of our veterans.
>
> Charlotte Pritt voted against honoring the men and women of West Virginia who fought in the Gulf War.

> Senator Pritt voted to allow the burning of the American Flag that all veterans fought so hard to defend.
>
> She even opposed requiring students to begin their day with the Pledge of Allegiance.
>
> Look behind the Smile.
>
> Charlotte Pritt – wrong on the issues.
>
> Wrong for West Virginia[.]
>
> Paid for by West Virginia State Victory Committee
> Mary M. Dotter, Treasurer
> Not authorized by Underwood for Governor

Television advertisements backed by the Victory Committee made similar claims.

Given the temporal restraints of the campaign's culmination, Ms. Pritt was unable to respond to many of these allegations.[2] Ultimately, she lost the general election to the Republican nominee for Governor, Cecil Underwood. Shortly after Governor Underwood assumed office, the Victory Committee was dissolved.

Subsequently, on October 31, 1997, Ms. Pritt filed a civil action in the Circuit Court of Fayette County against RNC, NRSC, the Victory Committee, John Doe, and Jane Doe.[3] In her lawsuit, Ms. Pritt alleged that the defendants

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[2] Once the damaging advertisements were disseminated, the Republican gubernatorial candidate, Cecil Underwood, denounced the ads, disassociated himself therefrom, and requested the Victory Committee to cease their further publication. The Victory Committee, however, refused these requests and continued to endorse the advertisements through Election Day 1996.

[3] Ms. Pritt filed an amended complaint on October 26, 1998.

had defamed her,[4] exposed her to "false light" publicity, and violated W. Va. Code § 3-8-11(c) (1995) (Repl. Vol. 1999).[5] Following discovery, the defendants collectively moved for summary judgment.[6] By order entered May 15, 2000, the circuit court granted the defendants' motion, ruling, in part, that

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[4] Specifically, the circuit court denominated Ms. Pritt's defamation claims as defamation *per quod* (Count I) and defamation *per se* (Count III). *See* Black's Law Dictionary 427 (7th ed. 1999) (defining "defamation *per quod* " as "[d]efamation that either (1) is not apparent but is proved by extrinsic evidence showing its injurious meaning or (2) is apparent but is not a statement that is actionable per se" and construing "defamation *per se* " to mean "[a] statement that is defamatory in and of itself and is not capable of an innocent meaning").

[5] W. Va. Code § 3-8-11 (1995) (Repl. Vol. 1999) criminalizes various improper election practices. Pertinent to the instant proceeding is subsection (c) thereof, which provides that

> [a]ny person who shall, knowingly, make or publish, or cause to be made or published, any false statement in regard to any candidate, which statement is intended or tends to affect any voting at any election whatever . . .
>
> . . . .
>
> [i]s guilty of a misdemeanor, and, on conviction thereof, shall be fined not more than ten thousand dollars, or confined in jail for not more than one year, or, in the discretion of the court, shall be subject to both such fine and imprisonment.

W. Va. Code § 3-8-11(c).

[6] A motion for summary judgment is permitted by Rule 56(c) of the West Virginia Rules of Civil Procedure when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."

> As a former state legislator and candidate for the office[ ] of Governor, plaintiff [Ms. Pritt] is a "public figure" for purposes of this lawsuit. . . .
>
> As a public figure, plaintiff must prove by "clear and convincing evidence" that the statements at issue were both false and published with "actual malice" – that defendants had "knowledge at the time of publication that they were false" or published them with "reckless and willful disregard for the truth." . . .
>
> Summary judgment on all four Counts is warranted because the statements at issue are not false. Defendants analyzed the legislative record and explained at length why all but one of the statements at issue are true, and why the last one is a protected expression of opinion. . . . In particular, defendants set forth plaintiff's legislative votes that supported each statement and countered the interpretations giving rise to plaintiff's claims. . . .
>
> Summary judgment on all four Counts is also warranted because there is no record evidence that any defendant acted with "actual malice."

(Citations omitted). In response to this ruling, Ms. Pritt filed, on May 25, 2000, a "motion for reconsideration," which the circuit court denied by order entered June 13, 2000. It is from these orders of the circuit court that Ms. Pritt now appeals to this Court.

II.

STANDARD OF REVIEW

The instant appeal comes to this Court from decisions of the circuit court granting summary judgment in favor of RNC and denying Ms. Pritt's post-judgment motion. We

typically apply a plenary review to an order of a circuit court deciding a summary judgment motion. "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Also involved in this proceeding are numerous legal questions, the resolution of which is integral to the summary judgment ruling. In this regard, we likewise review anew a lower tribunal's determination of questions of law. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

Finally, we must ascertain the appropriate standard of review to apply to the circuit court's order of June 13, 2000, whereby it denied Ms. Pritt's "motion for reconsideration." Generally speaking, "a 'motion to reconsider' is not a properly titled pleading in West Virginia." *Richardson v. Kennedy*, 197 W. Va. 326, 329, 475 S.E.2d 418, 421 (1996) (citations omitted). Nevertheless, we routinely re-characterize such motions as those made pursuant to Rules 59(e) or 60(b) of the West Virginia Rules of Civil Procedure depending upon when they were filed in the circuit court.

> When a party filing a motion for reconsideration does not indicate under which West Virginia Rule of Civil Procedure it is filing the motion, the motion will be considered to be either a Rule 59(e)[7] motion to alter or amend a judgment or a Rule 60(b)[8]

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[7] Rule 59(e) of the West Virginia Rules of Civil Procedure permits a party to file a "motion to alter or amend the judgment . . . not later than 10 days after entry of the judgment."

[8] W. Va. R. Civ. P. 60(b) permits, in pertinent part,

(continued...)

> motion for relief from a judgment order. If the motion is filed within ten days of the circuit court's entry of judgment, the motion is treated as a motion to alter or amend under Rule 59(e). If the motion is filed outside the ten-day limit, it can only be addressed under Rule 60(b).

Syl. pt. 2, *Powderidge Unit Owners Ass'n v. Highland Props., Ltd.*, 196 W. Va. 692, 474 S.E.2d 872 (1996) (footnotes added). *Accord* Syl. pt. 1, *Richardson v. Kennedy*, 197 W. Va. 326, 475 S.E.2d 418 ("'A motion to amend or alter judgment, even though it is incorrectly denominated as a motion to "reconsider", "vacate", "set aside", or "reargue" is a Rule 59(e) motion if filed and served within ten days of entry of judgment.' Syllabus Point 1, *Lieving v. Hadley*, 188 W. Va. 197, 423 S.E.2d 600 (1992).").

In the case *sub judice*, it appears from the record that Ms. Pritt filed her "motion for reconsideration" within ten days of the circuit court's summary judgment order.

> [o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Accordingly, we will treat this motion as one made pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure. *See* Syl. pt. 2, *Powderidge*, 196 W. Va. 692, 474 S.E.2d 872.

> The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed.

Syl. pt.1, *Wickland v. American Travellers Life Ins. Co.*, 24 W. Va. 430, 513 S.E.2d 657 (1998). Therefore, we apply a *de novo* standard of review to the circuit court's ruling in this regard. *See* Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755. Having established the standards of review applicable to this case, we proceed to consider the parties' arguments.

III.

DISCUSSION

On appeal to this Court, Ms. Pritt raises numerous assignments of error, including the circuit court (1) improperly granted summary judgment to RNC when there existed a genuine issue of material fact; (2) failed to determine whether the Victory Committee's advertisements were defamatory; (3) erroneously excluded deposition testimony; and (4) neglected to address the remaining claims asserted in her amended complaint. Despite these various contentions, however, the primary matter to be resolved by this Court is the propriety of the circuit court's summary judgment ruling. It is with this issue, then, that we will begin our deliberation and determination of this case.

"The function of summary judgment is 'to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required."

Powderidge, 196 W. Va. at 697, 474 S.E.2d at 877 (quoting *Hanlon v. Chambers*, 195 W. Va. 99, 106, 464 S.E.2d 741, 748 (1995)). Therefore, summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). In other words,

> "'[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963)." Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992).

Syl. pt. 1, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

> On the other hand, and as suggested by Rule 56(c), this Court will reverse summary judgment if we find, after reviewing the entire record, a genuine issue of material fact exists or if the moving party is not entitled to judgment as a matter of law. In cases of substantial doubt, the safer course of action is to deny the motion and to proceed to trial.

Id., 194 W. Va. at 58-59, 459 S.E.2d at 335-36.

When assessing whether summary judgment is appropriate, then, one of the main considerations is whether there exists a genuine issue of material fact. *See* W. Va. R. Civ. P. 56(c); Syl. pt. 1, *Williams*, 194 W. Va. 52, 459 S.E.2d 329.

> "Roughly stated, a 'genuine issue' for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient

> evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed 'material' facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law." Syl. Pt. 5, *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995).

Syl. pt. 2, *Tolliver v. Kroger Co.*, 201 W. Va. 509, 498 S.E.2d 702 (1997). In making such a determination,

> [t]he circuit court's function at the summary judgment stage is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986). Consequently, we must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion. . . . In assessing the factual record, we must grant the nonmoving party the benefit of inferences, as "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge [.]" *Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513, 91 L. Ed. 2d at 216. Summary judgment should be denied "even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir.), *cert. denied*, 342 U.S. 887, 72 S. Ct. 178, 96 L. Ed. 666 (1951).

Williams, 194 W. Va. at 59, 459 S.E.2d at 336 (additional citations omitted). Moreover,

> [a] nonmoving party need not come forward with evidence in a form that would be admissible at trial in order to avoid summary judgment. *Celotex Corp.[v. Catrett]*, 477 U.S. [317,] 324, 106 S. Ct. [2548,] 2553, 91 L. Ed. 2d [265,] 274 [(1986)]. However, to withstand the motion, the nonmoving party must show there will be enough competent evidence available at trial to enable a finding favorable to the nonmoving party.

Williams, 194 W. Va. at 60-61, 459 S.E.2d at 337-38 (citation omitted).

With these principles in mind, and upon a review of the record submitted for appellate consideration in this case, we conclude that there are genuine issues of material fact so as to necessitate the presentation of this case to a jury. Unlike the circuit court, we are not firmly convinced that the factual issues herein have been finally resolved. Specifically, before this Court, the parties repeatedly and continuously have argued the facts giving rise to the instant appeal and whether the allegedly defamatory statements were tainted with falsity or laced with malice. When faced with such an ongoing factual dispute, and inferences that, if viewed in the nonmovant's favor,[9] could support a verdict for the nonmovant, we must not continue to harbor these doubts as to whether summary judgment is appropriate but rather hand the case over to a jury, in whose province such factual

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[9] *See Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995) (counseling that, when deciding a motion for summary judgment, the reviewing tribunal "must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion. . . . In assessing the factual record, [it] must grant the nonmoving party the benefit of inferences. . . ." (citations omitted)).

determinations lie.[10] Accordingly, we reverse the circuit court's rulings granting summary judgment to RNC, and affirming the same, and remand this matter for further proceedings consistent with this Opinion.[11]

During our deliberation and decision of this case, it has come to our attention that the litigation of a cause of

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[10] We remain somewhat troubled by the circuit court's decision, during the summary judgment proceedings, to discredit the evidence introduced by Ms. Pritt to demonstrate the existence of a genuine issue of material fact. In prior cases we have held that

> "[t]he West Virginia Rules of Evidence . . . allocate significant discretion to the trial court in making evidentiary . . . rulings. Thus, rulings on the admissi[bility] of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary . . . rulings of the circuit court under an abuse of discretion standard." Syl. Pt. 1, in part, *McDougal v. McCammon*, 193 W. Va. 229, 455 S.E.2d 788 (1995).

Syl. pt. 9, *Tudor v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 111, 506 S.E.2d 554 (1997). While the circuit court generally possesses broad authority in this regard, where summary judgment proceedings are concerned, the evidentiary standard to be satisfied by the nonmoving party is not the same obstacle that he/she must overcome at trial. *See Williams*, 194 W. Va. at 60, 459 S.E.2d at 337 ("A nonmoving party need not come forward with evidence in a form that would be *admissible at trial in order to avoid summary judgment*." (citation omitted)). Furthermore, Ms. Pritt suggests that the deposition testimony she offered was admissible pursuant to several different provisions of the West Virginia Rules of Evidence, and not just under the one relied upon by the circuit court. Therefore, upon remand, we urge the circuit court to consider these various evidentiary rules if Ms. Pritt seeks to re-introduce this testimony.

[11] Based upon this disposition of the instant appeal, we need not consider further Ms. Pritt's remaining assignments of error.

action for defamation can prove to be a daunting task for even the most learned jurist or the most experienced counselor. Therefore, in an attempt to clarify this nebulous area of the law, we will briefly set forth the various tenets applicable to the case *sub judice*, pursuant to which remand proceedings should be conducted. First, due to the status of the complainant herein, the case must proceed as directed by the first Syllabus point of *Sprouse v. Clay Communication, Inc.*, 158 W. Va. 427, 211 S.E.2d 674 (1975):

> A candidate for political office is governed by the same rules with regard to recovery for libel[12] as a public official and can sustain an action for libel only if he can prove that: (1) the alleged libelous statements were false or misleading; (2) the statements tended to defame the plaintiff and reflect shame, contumely, and disgrace upon him; (3) the statements were published with knowledge at the time of publication that they were false or misleading or were published with a reckless and willful disregard of truth; and, (4) the publisher intended to injure the plaintiff through the knowing or reckless publication of the alleged libelous material.

(Footnote added). Thus, to sustain a cause of action for defamation, a public official, after establishing the existence of an allegedly defamatory statement, must prove that the statement was (1) false and (2) published with actual malice:

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[12] Generally speaking, "defamation" is "[a] false written or oral statement that damages another's reputation." Black's Law Dictionary 427 (7th ed. 1999). The specific type of "defamation" complained of herein is "libel," which is defined as "[a] defamatory statement expressed in a fixed medium, esp. . . . [an] electronic broadcast." *Id.* at 927.

> In order for a public official or a candidate for public office to recover in a libel action, the plaintiff must prove that: (1) there was the publication of a defamatory statement of fact or a statement in the form of an opinion that implied the allegation of undisclosed defamatory facts as the basis for the opinion; (2) the stated or implied facts were false; and, (3) the person who uttered the defamatory statement either knew the statement was false or knew that he was publishing the statement in reckless disregard of whether the statement was false.

Syl. pt. 1, *Hinerman v. Daily Gazette Co., Inc.*, 188 W. Va. 157, 423 S.E.2d 560 (1992).

The next step in a public official's defamation case requires the presiding court to ascertain whether the statements complained of are defamatory. "A court must decide initially whether as a matter of law the challenged statements in a defamation action are capable of a defamatory meaning." Syl. pt. 6, *Long v. Egnor*, 176 W. Va. 628, 346 S.E.2d 778 (1986). In making this assessment, the tribunal must also consider whether the allegedly defamatory statements could be construed as statements of opinion. "A statement of opinion which does not contain a provably false assertion of fact is entitled to full constitutional protection." Syl. pt. 4, *Maynard v. Daily Gazette Co.*, 191 W. Va. 601, 447 S.E.2d 293 (1994). "[W]hether a statement is one of fact or opinion is an issue that must be decided initially by a court." Syl. pt. 7, in part, *Long v. Egnor*, 176 W. Va. 628, 346 S.E.2d 778.

Once this hurdle has been overcome, a public official must prove the cause of action's elements. Falsity, the first such element, was explained by this Court in our prior case of *State ex rel. Suriano v. Gaughan*, as follows:

> The law of libel takes but one approach to the question of falsity, regardless of the form of the communication. It overlooks minor inaccuracies and concentrates upon substantial truth. Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified. A statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced.

Syl. pt. 4, 198 W. Va. 339, 480 S.E.2d 548 (1996). Actual malice, the second element to be proved in a public official's defamation action, is present if the statement at issue was made "with knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280, 84 S. Ct. 710, 726, 11 L. Ed. 2d 686, 706 (1964). *See also* Syl. pt. 1, *Sprouse*, 158 W. Va. 427, 211 S.E.2d 674. "Reckless disregard" has been further defined by the United States Supreme Court in *St. Amant v. Thompson* as indicative that "the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." 390 U.S. 727, 731, 88 S. Ct. 1323, 1325, 20 L. Ed. 2d 262, 267 (1968).

Finally, to establish actual malice, the complaining public official must prove its existence by clear and convincing evidence. "Plaintiffs who are public officials or public figures must prove by clear and convincing evidence that the defendants made their defamatory statement with knowledge that it was false or with reckless disregard of whether it was false or not." Syl. pt. 2, in part, *Suriano*, 198 W. Va. 339, 480 S.E.2d 548. *See also Sullivan*, 376 U.S. at 285-86, 84 S. Ct. at 729, 11 L. Ed. 2d at 710 (observing that a public official must prove actual malice with "convincing clarity"). *But see Dodd v. Pearson*, 277 F. Supp. 469, 471

(D.D.C. 1967) (requiring public official to prove actual malice by "a fair preponderance of the evidence"). Similarly, "[i]n order for a public official or a candidate for public office to recover in a libel action, he must prove by clear and convincing evidence that ... the stated or implied facts were false."[13] *Hinerman*, 188 W. Va. at 168-69, 423 S.E.2d at 571-72 (citations omitted). *Cf. Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 661 n.2, 109 S. Ct. 2678, 2682 n.2, 105 L. Ed. 2d 562, 572 n.2 (1989) (noting that "[t]here is some debate as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence," but concluding that the Court "express[es] no view on this issue"). *But see Rowden v. Amick*, 446 S.W.2d 849, 857 (Mo. Ct. App. 1969) (concluding that public official's burden of proof as to falsity and actual malice is by a "preponderance of the evidence" standard).[14] This burden of

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[13] In her brief, Ms. Pritt contends that a public official need prove only by a preponderance of the evidence that the allegedly defamatory statements were false. However, the cases cited in support of this proposition do not definitively resolve this issue as their only references thereto consist of recitations of jury instructions with no corresponding rulings as to the appropriateness of such a standard therein. *See Estep v. Brewer*, 192 W. Va. 511, 514 n.3, 453 S.E.2d 345, 348 n.3 (1994) (per curiam); *Sprouse v. Clay Communication, Inc.*, 158 W. Va. 427, 462 n.10, 211 S.E.2d 674, 697 n.10 (1975).

[14] Although no longer relevant to the instant proceeding given that this case cannot be disposed of summarily, we note that a public official opposing a summary judgment motion must establish his/her *prima facie* case of defamation, and the elements thereof, by clear and convincing evidence:

> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), requires a libel plaintiff who is a public official or a public figure to resist a motion for summary

(continued...)

proof likewise was recognized by Justice Miller in his dissent to the majority's opinion in *Hinerman*:

> under First Amendment law, [a public official] plaintiff [has] to prove by clear and convincing evidence each of the . . . elements [of libel] to recover damages. . . . [Thus], the plaintiff [has] to prove that the . . . statements were, in the language of *Masson [v. New Yorker Magazine, Inc.*], false or misleading to the extent that the true facts would have produced a "'different effect on the mind of the reader'" because "[m]inor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.'" [501] U.S. [496,] [517], 111 S. Ct. [2419,] 2433, 115 L. Ed. 2d [447,] 472 [(1991)] (Citations omitted).

188 W. Va. at 187, 423 S.E.2d at 590.

While the above survey of the law is not intended to be exhaustive, we do hope that it provides the necessary guidance for the continuation of the instant litigation. Thus, it is with great optimism that we have provided this concise rubric in the hope that future proceedings in this case will be fairly and judiciously determined.

---

judgment by showing clear and convincing evidence of the defendant's actual malice. That is, the federal (and state) constitutional protections of free speech require a stricter standard of evidence to survive pretrial motions in such cases than is required in other cases.

Crain v. Lightner, 178 W. Va. 765, 769 n.1, 364 S.E.2d 778, 782 n.1 (1987) (citing *Long v. Egnor*, 176 W. Va. 628, 635-36, 346 S.E.2d 778, 785-86 (1986)).

IV.

CONCLUSION

Because we find genuine issues of material fact rendered summary judgment improper in this matter, we reverse the May 15, 2000, and June 13, 2000, orders of the Circuit Court of Fayette County and remand this case for further proceedings consistent with this Opinion.

Reversed and Remanded.

Justice MAYNARD, deeming himself disqualified, did not participate in the decision of this case.

Judge MADDEN, sitting by temporary assignment.

ALBRIGHT, Justice, concurring.

I fully concur in the judgment of the Court and in Justice Davis' opinion.

I write separately to note disagreement with a position Appellees asserted. Appellees suggested to us, as I understood them, that because the author of the commercials at issue in this case asserted a belief that the information contained in the commercials relating to Appellant's past actions was factually accurate, neither Appellee could be found guilty of malice or be found to have defamed Appellant.

Respectfully, I suggest that the issue is what Appellees, or either of them, knew or should have known regarding the factual content and the context of the commercials. Appellees' appreciation of the factual content and the context of the commercials springs from the knowledge and experience of the leadership, staff and respective governing bodies of each of the Appellees. What

a hired wordsmith knew or should have known is but a part of the picture. Appellees cannot be permitted to hide behind deficiencies in that wordsmith's appreciation of what his commercials said to the public about Appellant.

I am authorized to state that Justice STARCHER joins in this concurring opinion.

Twelfth Judicial Circuit of West Virginia
Fayette County
Charles M. Vickers, Judge
P.O. Box 599
Fayetteville, West Virginia 25840
May 15, 2000

Michael W. Carey, Esq.
Carey, Hill, Scott, Winter & Johnson
P.O. Box 3884
Charleston, WV 25338

H.H. Roberts, Esq.
Suite 214, Professional Building
1036 Quarrier Street
Charleston, WV 25301

Re: Charlotte Pritt vs.
The Republican National Committee, et al.
Civil Action No. 97-C-380

Gentlemen:

The Court has reviewed the entire file in this action and has given the parties an opportunity to submit a proposed order prior to announcing a decision on defendants' motion for summary judgment.

The motion for summary judgment is granted, and the findings of fact and conclusions of law set forth in the proposed order are adopted by this Court as accurately reflecting the existing law and the record.

Very truly yours,

s/ Charles M. Vickers

IN THE CIRCUIT COURT FOR
FAYETTE COUNTY, WEST VIRGINIA

CHARLOTTE PRITT,

Plaintiff,

v. No. 97-C-380(v)

THE REPUBLICAN NATIONAL COMMITTEE, et al.,

Defendants.

SUMMARY JUDGMENT ORDER

The Court, having considered defendants' motion for summary judgment and the parties' memoranda of law, and having heard oral argument on August 26, 1999, hereby GRANTS defendants' motion for summary judgment.

FINDINGS OF FACT

Plaintiff, Charlotte Jean Pritt, a former member of the West Virginia state legislature, was the Democratic nominee for Governor of West Virginia in 1996. She lost that election. Defendants are the Republican National Committee, the National Republican Senatorial Committee, and the West Virginia State Victory Committee. From October 24 until November 5, 1996 (Election Day), the Victory Committee sponsored radio and television advertisements that discussed the legislative voting record of

plaintiff. These advertisements were created by political consultant David Welch, who is not a defendant.

Plaintiff filed a complaint against defendants on October 31, 1997, and filed the Amended Complaint that is the subject of this Order on October 26, 1998. The Amended Complaint asserts that through the advertisements, defendants defamed plaintiff per quod (Count I) and per se (Count III), violated W. Va. Code § 3-8-11(c) (Count II), and exposed plaintiff to "false light" publicity (Count IV). Plaintiff attached the radio advertisement to her Amended Complaint and has identified several statements as the basis of her claims.

CONCLUSIONS OF LAW

As a former state legislator and candidate for the officer of Governor, plaintiff is a "public figure" for purposes of this lawsuit. *Long v. Egnor*, 176 W. Va. 628, 630 (1986); *Sprouse v. Clay Commun., Inc.*, 158 W. Va. 427, 432, *cert. denied*, 434 U.S. 882 (1975).

As a public figure, plaintiff must prove by "clear and convincing evidence" that the statements at issue were both false and published with "actual malice" – that defendants had "knowledge at the time of publication that they were false" or published them with "reckless and willful disregard for the truth." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350-51 (1974). West Virginia courts are familiar with these requirements. *Long*, 176 W. Va. at 630; *Sprouse*, 158 W. Va. at 432. The court must "decide initially" whether the statements at issue are "capable of a defamatory meaning," *Long*, 176 W. Va. at 637, and "independently decide" whether plaintiff has come forward in response to a well-supported summary judgment motion with clear and

convincing evidence of actual malice. *Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485, 511-12 (1984).

Summary judgment on all four Counts is warranted because the statements at issue are not false. Defendants analyzed the legislative record and explained at length why all but one of the statements at issue are true, and why the last one is a protected expression of opinion. *Maynard v. Daily Gazette Co.*, 191 W. Va. 601, 604-06 (1994). In particular, defendants set forth plaintiff's legislative votes that supported each statement and countered the interpretations giving rise to plaintiff's claims. Plaintiff's only record evidence concerning falsity (other than her own assertion) consists of deposition testimony from Michael Withers and Lyle Sattes, who served with plaintiff in the state legislature. These witnesses offered their opinion that two of the statements at issue falsely construed their intent in voting as they and plaintiff voted on the bills at issue. Opinion testimony, however, is not probative unless provided by an expert witness designated pursuant to W. Va. R. Civ. P. 26(b)(4), and plaintiff has not designated either of these witnesses as an expert. Neither witness disputed that plaintiff cast the votes at issue, or that the legislation could reasonably be interpreted as summarized in the advertisements. Their testimony does not create a genuine issue of material fact.

Summary judgment on all four Counts is also warranted because there is no record evidence that any defendant acted with "actual malice." Plaintiff contends that David Welch, who created the advertisements but is not a defendant, "should have known" the statements at issue were false. What Mr. Welch "should have known" is irrelevant because negligence does not satisfy plaintiff's burden of proof. *Masson v. The New Yorker Magazine*, 501 U.S. 496, 510 (1991). Further, Mr. Welch testified at his deposition that he reviewed the legislative record and believed the advertisements were "absolutely truthful." Craig Engle, General Counsel of defendant National Republican

Senatorial Committee, also stated in an Affidavit that he studied the advertisements, compared their statements with plaintiff's votes, and approved them for publication only after he was satisfied that they were true. There is no genuine issue of material fact concerning "actual malice."[1]

CONCLUSION

It is therefore ORDERED that defendants' motion for summary judgment is GRANTED as to plaintiff's Amended Complaint.

s/_____
Judge Charles M. Vickers
Circuit Court of Fayette County

ENTERED this 15 day of May, 2000.

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1 The Court notes but does not consider defendants' contentions that all four Counts are time-barred, that plaintiff cannot prove any injury caused by the advertisements, and that neither Count II nor Count IV states a sufficient claim.

IN THE CIRCUIT COURT FOR
FAYETTE COUNTY, WEST VIRGINIA

CHARLOTTE PRITT,

Plaintiff,

v. No. 97-C-380(v)

THE REPUBLICAN NATIONAL COMMITTEE, et al.,

Defendants.

ORDER DENYING PLAINTIFF'S
"MOTION FOR RECONSIDERATION"

The Court, having considered the "motion for reconsideration" filed by plaintiff Charlotte Pritt, and having also considered the memoranda filed in support of and in opposition to said motion, hereby DENIES said motion as providing no basis for the Court to conclude that it erred in entering summary judgment for defendants by Order dated May 15, 2000.

s/_____
Judge Charles M. Vickers
Circuit Court of Fayette County

ENTERED this 13th day of June, 2000.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 3rd day of April, 2001, the following order was made and entered:

Charlotte Pritt, Plaintiff
Below, Appellant

vs.) No. 29326

The Republican National Committee,
et al., Defendants Below, Appellees

On a former day, to-wit, December 8, 2000, came the petitioner, Charlotte Pritt, by H. H. Roberts, her attorney, and presented to the Court her amended petition praying for an appeal from a judgment of the Circuit Court of Fayette County, rendered on the 13th day of June, 2000, with the record accompanying the petition. Thereafter, on the 5th day of January, 2001, came the respondents, the Republican National Committee, the National Republican Senatorial Committee and the West Virginia State Victory Committee, by Carey, Scott & Douglas, and Michael W. Carey, and Covington & Burling, Bobby R. Burchfield and Jason A. Levine, their attorneys, and presented to the Court their written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby grant said petition for appeal. Justice Maynard would refuse.

It is hereby ordered that the above-captioned proceeding be submitted upon the original record, briefs of counsel and oral argument if requested by the parties.

It is further ordered that the appellant file an original and nine copies of a brief within thirty days of receipt of this order; the appellees to file a like number of briefs within thirty days of receipt of the appellant's brief, with any reply brief deemed necessary to be filed within fifteen days of receipt of appellees' brief.

A True Copy

Attest: s/_____
Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA
IN THE SUPREME COURT OF APPEALS
IN VACATION

Charlotte Pritt, Plaintiff Below, Appellant

vs.) No. 29326

The Republican National Committee,
et al., Defendants Below, Appellees

On a former day, to-wit, July 9, 2001, came the appellees, the Republican National Committee, et al., by Carey, Scott & Douglas, and Michael W. Carey, and Covington & Burling, Bobby R. Burchfield and Jason A. Levine, their attorneys, and presented to the Court their motion in writing requesting the voluntary disqualification of the Honorable Larry V. Starcher, Justice of the Supreme Court of Appeals of West Virginia, for the reasons stated therein. .

Thereafter, on this day came the Honorable Larry V. Starcher, Justice of the Supreme Court of Appeals of West Virginia, pursuant to Rule 29(f) of the Rules of Appellate Procedure, and notified the Clerk of the Court of his refusal to voluntarily disqualify himself.

DONE IN VACATION of the Supreme Court of Appeal this 10th day of July, 2001

Honorable Larry V. Starcher, Justice

Received the foregoing order this 10th day of July, 2001, and entered the same in Order Book No. 142.

A True Copy

Attest: s/_____
Clerk, Supreme Court of Appeals

Supreme Court of Appeals
Charleston, West Virginia
25305

LARRY V. STARCHER
Justice

July 10, 2001

MEMORANDUM

TO: Rory Perry, Clerk

FROM: Justice Starcher

RE: *In Re: Appeal No. 00-2519*

A Motion to Disqualify Justice Starcher has been filed asking that I recuse myself "from presiding over or taking any action in this proceeding." The motion was filed on July 9, 2001, pursuant to Rule 29 of the Rules of Appellate Procedure for the Supreme Court of Appeals of West Virginia.

The Motion suggests that I should recuse myself from this matter because I was a candidate in 1996 and campaigned some with the Plaintiff-Appellant. Furthermore, it is suggested that I "made comments on the record seemingly prejudging this appeal" during oral arguments before the Court on April 3, 2001.

I was a candidate for election to the Supreme Court in 1996, but also were two other sitting justices – Justice Elliott Maynard and Justice Joseph Albright. It's also true that I did comment on the case in Court on April 3, 2001, as did other

justices. Justices are provided briefs before oral argument and do not come to the Courtroom uninformed. But whether my inquiries were "prejudicial," or whether I might have been playing the "devil's advocate," cannot be judged from the comments standing alone. Regardless, this would not bar me from sitting as an appellate judge on this case.

I decline to recuse myself from my judicial duties pursuant to Rule 29 of our Rules of Appellate Procedure because I neither have any financial or relationship interests in the matter, nor have I prejudged the legal or factual issues of the case. Despite my inquiry during oral arguments, and my being a candidate along with the Plaintiff-Appellant and two other justices in 1996, I can fairly sit on this matter and properly, correctly and fairly apply the law, whichever way it goes.

I respectfully decline to step aside in this matter.

LVS:lw

xc: Other Justices (with motion)

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 2nd of October, 2001, the following order was made and entered:

Charlotte Pritt, Plaintiff
Below, Appellant

vs.) No. 29326

The Republican National Committee,
et al., Defendants Below, Appellees

This day came the Honorable Elliott E. Maynard, Justice of the Supreme Court of Appeals of West Virginia, and notified the Clerk of this Court, pursuant to Rule 29(b) of the Rules of Appellate Procedure, of his voluntary disqualification from participating in the above-captioned matter.

A True Copy

Attest: s/_____
Clerk, Supreme Court of Appeals

DAVID WELCH ASSOCIATES
Client: WV State Victory Committee
"Record"
TV/ :30 Seconds
WVE.001

VISUAL	AUDIO *(Voice over with music bed)*
Start close on CP's faced; pull out to reveal smile	BEHIND CHARLOTTE PRITT'S CAMPAIGN SMILE IS A LIBERAL VOTING RECORD SHE CAN'T HIDE FROM.
Slow, grainy b&w of CP with kids. CG – Proof: 1989 Senate Bill 531 with bill image	IN THE STATE SENATE, CHARLOTTE PRITT PROPOSED TEACHING FIRST GRADERS ABOUT CONDOMS.
CG white on black: Surprised?	SURPRISED? YOU SHOULDN'T BE.
Adult video store…to close up of little girl CG: Proof: 1990 Senate Bill 184 with bill image	SENATOR PRITT ALSO VOTED TO PERMIT THE SALE OF PORNOGRAPHIC VIDEOS…TO CHILDREN.
Kids at school CG: Proof: 1990 Senate Bill 639 with bill image	SHE EVEN VOTED TO ALLOW CONVICTED DRUG ABUSERS TO WORK IN OUR PUBLIC SCHOOLS.

Return to CP's smile and freeze.	LOOK BEHIND THE SMILE
CG: Charlotte Pritt.	CHARLOTTE PRITT.
Wrong for West Virginia.	WRONG ON THE ISSUES.
Paid by West Virginia State Victory Cmte.	WRONG FOR WEST VIRGINIA.

Supreme Court, U.S.
FILED

JUL 9 2002

OFFICE OF THE CLERK

No.s 01-1328 & 01-1331

IN THE
Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE AND NATIONAL REPUBLICAN SENATORIAL COMMITTEE,

Petitioners,

v.

CHARLOTTE PRITT,

Respondent.

On Petitions for Writ of Certiorari to The Supreme Court of Appeals of West Virginia

BRIEF IN OPPOSITION

H. H. Roberts, Attorney
W.V.S.B. No. 3127
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Counsel for Respondent

July 12, 2002

38 pp

No.s 01-1328 & 01-1331

IN THE
Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE AND NATIONAL REPUBLICAN SENATORIAL COMMITTEE,

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v.

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On Petitions for Writ of Certiorari to The Supreme Court of Appeals of West Virginia

BRIEF IN OPPOSITION

H. H. Roberts, Attorney
W.V.S.B. No. 3127
Suite 214, Professional Bldg.
1036 Quarrier Street
Charleston, W. V. 25301
(304) 344-9672

Counsel for Respondent

July 12, 2002

QUESTIONS PRESENTED

1. Is the decision by the Supreme Court of Appeals of West Virginia (West Virginia Supreme Court), which remands the case for further proceedings consistent with recognized decisions by the Supreme Court of the United States, a "final judgment" as contemplated by 28 U.S.C. § 1257(a)?

2. Are there "compelling reasons" for the Supreme Court of the United States to grant a writ of certiorari to review a decision of the West Virginia Supreme Court which decision is not within the parameters set forth in Rule 10[1]?

3. Are there compelling reasons for the Supreme Court of the United States to grant a writ of certiorari to review a decision of the West Virginia Supreme Court which would require the Court to review, *de novo,* a voluminous record designated by the parties from the lower court and require the Court to substitute its judgment for that of the West Virginia Supreme Court which decided the matter on a 5 - 0 vote?

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[1] Reference is made to U.S. Supreme Court Rule No. 10, "CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI."

PARTIES TO THE PROCEEDINGS

The following are parties to the proceedings below:

(1) Plaintiff, Ms. Charlotte Pritt, a school teacher and the Democratic nominee for Governor of West Virginia in the 1996 general election.

(2) Defendant, the Republican National Committee (RNC), the national Republican party official organization under the United States Federal Election Commission (FEC).

(3) Defendant, the National Republican Senatorial Committee (NRSC), a political committee registered with the FEC under FECA. It is devoted to the election of Republican candidates to the United States Senate.[2]

(4) Defendant, the West Virginia State Victory Committee (WVSVC), the alter-ego of the NRSC, having common employees as officers and a common address. It was organized by the NRSC in October 1996 and registered with the W. Va. Secretary of State on October 4, 1996. Its sole purpose and function was to air political advertisements against the Plaintiff. The WVSVC was dissolved by the NRSC on April 6, 1998.

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[2] *Federal Election Commission v. National Republican Senatorial Committee,* 761 F. Supp. 813, 816 (D.D.C. 1991).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED..... i

PARTIES TO THE PROCEEDING.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....iv

BRIEF IN OPPOSITION.....1

I. OPINIONS BELOW..... 1

II. JURISDICTION 2

III. CONSTITUTIONAL PROVISIONS.....7

IV. STATEMENT OF THE CASE.....7

V. SUMMARY OF ARGUMENT.....10

VI. ARGUMENT 10

Argument in Response to RNC.....13

Argument in Response to NRSC.....16

1. "Condoms" allegation.....21
2. "Pornographic" allegation.....23
3. "Drug abusers" allegation.....23
4. "Can't trust" allegation.....24
5. "Vote against honoring" allegation.....24
6. "Burning Flag" allegation.....26
7. "Pledge of Allegiance" allegation.....26

VII. *SPROUSE V. CLAY COMMUNICATIONS*.....27

VIII. CONCLUSION.....28

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986).....10, 11, 12, 13

ASARCO Inc., et al. v. Kadish, et al.,
490 U.S. 605 (1989).....3

Cox Broadcasting Corporation v. Cohn,
420 U.S. 469 (1975).....3

Fort Wayne Books, Inc. v. Indiana,
489 U.S. 46 (1989).....5

Federal Election Commission v. National Republican Senatorial Committee,
761 F. Supp. 813 (D.D.C. 1991).....ii

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989).....13, 14

Hinerman v. Daily Gazette Co. Inc.,
423 S.E.2d. 560 (1992).....14

Lake City Corp. v. City of Mequon,
558 N.W.2d 100 (1997).....23

Long v. Egnor,
346 S.E.2d 778 (1986).....14

Masson v. New Yorker Magazine, Inc.,
501 U.S. 496 (1991).....14, 17

Maynard v. Daily Gazette Co.,
447 S.E.2d. 293 (1994).....14

Miami Herald Company v. Tornillo,
418 U.S. 241 (1974).....4

Pritt v. Republican National Committee,
1 Fed. Supp.2d 590 (1998).....1

Pritt v. Republican National Committee,
557 S. E.2d 853 (2001).....1

New York Times v. Sullivan,
376 U.S. 254 (1964).....14

Painter v. Peavy,
451 S.E.2d. 755 (1994).....20

Sprouse v. Clay Communications,
211 S.E.2d. 674 (1975).....14, 27

St. Amant v. Thompson,
390 U.S. 727 (1968).....14, 17

State ex rel. Suriano v. Gaughan,
480 S.E.2d. 548 (1996).....14

Texas v. Johnson,
491 U.S. 397 (1998).....26

CONSTITUTION

U.S. Const. Amend. I.....4, 5, 7, 20, 21, 26, 28, 29

U.S. Const. Amend. IV.....7, 21, 28

U.S. Const. Amend XIV.....7

STATUTES, RULES AND REGULATIONS

28 U.S.C. § 1257(a).....i, 2, 28

U.S. Supreme Court Rule 10.....i , 5, 6, 28

W. Va.R.Civ.P. Rule 56(c).....9

MISCELLANEOUS

W.Va. Senate Bill 531.....21, 22, 23
(March 20, 1989)
W.Va. Senate Bill 184.....23
(March 7, 1990)
W.Va. Senate Bill 639.....23, 24
(February 24, 1988)
W.Va. Concurrent Resolution 4.....24, 25
(January 24, 1991)
W.Va. House Joint Resolution 109.....25, 26
(February 29, 1992)
W.Va. Senate Resolution 31.....26
(March 9, 1991)
W.Va. House Bill 1193.....26
(February 11, 1986)
Blacks Law Dictionary (Third Edition).....2

BRIEF IN OPPOSITION

This Brief is in opposition to two Petitions for writ of certiorari for review of a 5-0 decision rendered by the Supreme Court of Appeals of West Virginia (West Virginia Supreme Court) in the case of *Charlotte Pritt v. The Republican National Committee, et al.*, 557 S.E.2d. 853 (2001).

I. OPINIONS BELOW:

There are three decisions which have been generated by this case to date, namely:

(1) *Pritt v. The Republican National Committee, et al.*, 1 Fed.Supp.2d 590 (1998), whereby the District Court remanded the case back to Fayette Circuit Court on April 16, 1998.

(2) Fayette Circuit Judge Vickers' order granting Petitioners' Motion for Summary Judgment on May 15th, 2000.[3]

(3) The 5-0 decision by the West Virginia Supreme Court, filed December 12, 2001, 557 S.E.2d. 853 (2001), which reversed Judge Vicker's decision on the basis of the Court's *de novo* review of the record.[4]

---

[3] See page 25a of the Appendices of both Petitioners' Petition.

[4] A copy of this decision is included in both of Petitioners' Petitions as "Appendix A". Respondent's Brief will refer to page numbers in Petitioners' "Appendix A", the West Virginia Supreme Court decision. E.g. 1a is the first page of the decision.

II. JURISDICTION:

The Petitioners' section on "Jurisdiction" does not accurately portray the West Virginia Supreme Court decision, the facts of the case or the applicable law as to the question of jurisdiction.

Petitioners contend that the decision of the West Virginia Supreme Court is a "final judgment" as contemplated by 28 U.S.C. § 1257(a) and should be reviewed by a writ of certiorari. Respondent disagrees with this and contends that the West Virginia Supreme Court decision is not a "final judgment".

Black's Law Dictionary defines "final judgment".

> "***Final Judgment*** **is one which puts an end to a suit".**[5]

The subject case was remanded by the West Virginia Supreme Court for trial under guide lines consistent with prior decisions. No "final judgment" was rendered. The further proceedings provided for will give both parties ample opportunity to fully develop their positions and their respective portions of the case.

> "Under 28 U.S.C. § 1257, this Court has jurisdiction to review only '[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had.' Because the Colorado Supreme Court, 633 P.2d 455, remanded this case

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[5] *Blacks Law Dictionary, Third Edition,* page 1027.

> for trial, its decision in not final 'as an effective determination.'"
> *O'Dell, et al. v. Espinoza, et al.,*
> 456 U.S. 430, (1982)

Petitioners cite several decisions as "exceptions" to the "final judgment" rule. What transpired in the lower court and the West Virginia Supreme Court does fall in any of these "exceptions".

ASARCO Inc., et al. v. Kadish, et al., 490 U.S. 605 (1989), presented a constitutional challenge to Ariz. Rev. Stat. Ann. 27-234(B). The Court reviewed and reversed the Arizona Supreme Court decision that decided the subject statute was constitutional. The Court noted two "exceptions" to the "final judgment or decree" rule.

> (1) Where "the federal issue is conclusive" and "the outcome of further proceedings pre-ordained" and,
>
> (2) the federal questions that could come to this Court have been adjudicated by the state court, and the remaining issues will not give rise to any further federal question.

Our present case does not involve the constitutional challenge of a state statute and does not fall within this two part exception.

Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975) involved "freedom of the press".

The father of a rape victim brought a civil action against the Broadcasting company on the basis that they had violated the Georgia "rape shield" statute by publishing the name of his daughter. The trial court

granted a summary judgment in favor of the father since there were no issues as to the facts. The Broadcasting company contested the constitutionality of the statute since the name of the victim was a matter of public record. The Georgia Supreme Court affirmed the lower court and remanded for further proceedings.

Following a "pragmatic approach" the Court reviewed the case on Certiorari as a "final decision or decree" of the states' highest court involving a state statute that may be in conflict with the First and Fourteenth Amendments. The state statute imposed sanctions on a television company that had accurately reported judicial records maintained in connection with prosecution. These records were a matter of public information.

Our present case clearly does not fall inside the frame work of the *Cox "exception"* which involves the constitutionality of a state statute.

In *Miami Herald Company v. Tornillo,* 418 U.S. 241 (1974) "freedom of the press" was the issue. The Florida statute in question required newspapers which "assail the character of a political candidate" to afford free space for reply by that candidate. The lower court ruled that the statute was unconstitutional. The Florida Supreme Court reversed the lower court and remanded for further proceedings.

The Court considered the Florida Supreme Court's decision as a "final decision" and reversed. The constitutionality of a statute was the pivotal issue of the civil claim. The Florida Supreme Court had made what amounted to a "final decision" in

this regard and had remanded the case to go forward on that premise.

In our present case we do not have the constitutionality of a statute at issue.

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) is cited for the proposition that the First Amendment protection is a "federal policy" which merits exception to the "final decision" rule. In that case, the Indiana RICO statute was challenged by the defendant's claim that its First Amendment rights had been denied. *Fort Wayne Books* had been charged with repeated violations by distribution of obscene matter which was treated as a pattern of conduct and in violation of the RICO statute. Upon certification, the Indiana Supreme Court ruled the statute constitutional.

The Court affirmed the decision and stated that it was appropriate to review the case "[W]here the federal issue has been finally decided in the state courts..." In our present case, the West Virginia Supreme Court did not finally decide any federal issue.

Again, we have a state statute involved. The above citation does not apply to our present case.

All four decisions cited by Petitioners involve challenge to the U. S. Constitution by a state statute.

Court's Rule 10, "Considerations Governing Review on Certiorari" is very instructional as to when the Court would be expected to exercise its discretion to review on certiorari. "A petition for a writ of certiorari will be granted only for compelling reasons."

This case does not satisfy Rule 10 in that we do not have a situation where a "state court of last resort has decided an important question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals" as provided by Rule 10(b).

Nor do we have a situation where "a state court…has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." as provided by Rule 10(c).

The West Virginia Supreme Court merely addressed the propriety of a lower court's summary judgment and remanded with guidance consistent with decisions of the Supreme Court of the United States.

Finally, at this juncture of the case, with no "final judgment" having been rendered, with prospects that both parties will have full opportunity to develop their respective portions of the case, with prospects that there will be opportunities for both parties to seek review in the future by the Court of any constitutional questions that may arise and the fact that Petitioners have lost no rights nor suffered any detriment at this time, there is **no compelling reason** the Court should review this case.

A review of this case should not be granted merely on Petitioners' speculation that in the future, they may be denied some constitutional protection.

III. CONSTITUTIONAL PROVISIONS:

Respondent agrees with Petitioners that the First and Fourteenth Amendment to the United States Constitution are involved in this case. Respondent does not agree, however, with Petitioners' speculation that by allowing this case to go forward, a conflict with these Amendments will develop. Quite the contrary, Respondent is of the opinion that it is necessary to allow this case to go forward to protect Respondent's rights under the Fourth Amendment.

We must also consider the Constitutional mandate that provides for the election of government officials. False advertisements about the Respondent misinformed the electorate. A misinformed electorate is effectively disenfranchised. This defeats the "election of government officials" principle. The principle of "governed by the consent of the governed" is effectively nullified by a misinformed electorate.

IV. STATEMENT OF THE CASE:

This case is a common law libel action by a nominee for a state office against two national political organizations which, on the eve of an election, fabricated, paid for and arranged for the broadcasting of a series of "negative ads" about Respondent that were false and misleading.

The action below is not against the Respondent's opponent, who disavowed the subject advertisements and ask that they be terminated.

The action below is not against any element of the media and hence "freedom of the press" is not an issue.

The action below has been prosecuted solely by Respondent as an individual and no political organizations of any nature have contributed to its prosecution, financially, technically or in any other manner.

Respondent, Charlotte Pritt, was a school teacher with 17 years experience in the public school system. She was a former member of the House of Delegates and the State Senate and was the Democratic nominee for Governor in the 1996 West Virginia general election. On the eve of the election, Petitioners fabricated and published a series of false negative advertisements about Respondent that libeled, slandered and defamed her. These advertisements were broadcast 106 times in Fayette County by two Fayette County radio stations. The advertisements were also broadcast state wide by five television stations and seventeen radio stations.

Respondent brought the subject libel action in state court (Circuit Court of Fayette County, West Virginia) on October 31, 1997. This libel was based on the false and misleading political advertisements which were arranged for by NRSC through its alter-ego, the West Virginia State Victory Committee (WVSVC).

The political advertisements at issue were each identified in a Report filed with the West Virginia Secretary of States Office by the Petitioners' media services (Mentzer Media) as "ad(s) opposing Pritt". Collectively, hereafter, reference will be made to the

"Ads opposing Pritt" or the "Ads" and include all the television and radio advertisements that Respondent has identified from the required Reports made to the Secretary of State.

Petitioners immediately removed the case to the District Court for the Southern District of West Virginia which remanded the case back to Fayette Circuit on April 16, 1998. The Fayette Circuit Court set a trial date of June 5, 2000.

On June 15, 1999, pursuant to W. Va. R. Civ. P. Rule 56[6], Petitioners filed a Motion for Summary Judgment. Oral hearing was held by the Fayette Circuit Court on August 26, 1999. By order dated May 15, 2000, the court granted summary judgment.

Respondent petitioned for and was granted an appeal by the West Virginia Supreme Court on December 8, 2000. The court heard oral arguments on October 3, 2001 and by 5-0 decision, entered on December 12, 2001, reversed the lower court's decision granting summary judgment.

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[6] W.Va.R.Civ.P. Rule 56(c) provides that "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, **show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."** (Emphasis provided)

V. SUMMARY OF ARGUMENT:

Respondent's argument includes the following points:

1. Respondent disputes Petitioners' argument that there is jurisdiction for review of this case under a writ of certiorari. This is addressed in the "JURISDICTION" section of this Brief .
2. Respondent disputes Petitioners' argument that the West Virginia Supreme Court failed to independently review the record.
3. Respondent disputes Petitioners' argument that there is no evidence as to the falseness of the "Ads opposing Pritt"
4. Respondent disputes Petitioners' argument that there is no evidence as to the "actual malice" of the Petitioners in publishing the "Ads opposing Pritt".
5. Respondent disputes Petitioners' argument that this case poses a serious and imminent threat to the First Amendment that requires it be reviewed under a writ of certiorari.

VI. ARGUMENT:

Repondent's argument which follows is not in anyway to be interpreted as deprecating the serious concerns Respondent has with the question of jurisdiction .

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), which is noted twice in the West Virginia

Supreme Court decision, is of great precedential value to our present case. Liberty Lobby brought a libel action in D.C. District Court against Jack Anderson, publisher of the "Investigator" which published three articles about founder Willis Carto. This action alleged the articles contained 28 statements and 2 illustrations that were false and derogatory. On motion by defendant, under Rule 56, the District Court granted summary judgment. The Court of Appeals affirmed in part and reversed in part. The U. S. Supreme Court reversed the Court of Appeals and remanded the case for further proceedings. At page 247 the Court stated:

> "More important for present purposes, summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."

At pages 247/248 the Court further stated:

> "Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under Rule 56, but it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."

In *Anderson v. Liberty Lobby*, at page 250, the Court notes the role of the jury as to the issue of "credibility":

> "Credibility determination, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge whether he is ruling on a motion for summary judgment or for a directed verdict."

Credibility of Petitioners and those working for them is an important aspect of Respondent's proof that the "Ads opposing Pritt" were false negative ads that were spawned in a stream of deception.

At least seven areas of deception by Petitioners can be identified relative to the "Ads opposing Pritt".

(1) In order to convince them to broadcast the "Ads", Petitioners' political consultant, David Welch (Welch) sent a letter to the various TV and Radio stations prior to their broadcast that distorted Respondent's legislative record.

(2) Shortly after the "Ads" commenced, Petitioners' Welch, the author of the "Ads", made a false statement to the press that the "Ads" were paid for by West Virginia donors.

(3) The "Ads" indicated that they were paid for by the WVSVC when in fact they were paid for by a loan that the NRSC received from Signet Bank.

(4) The use of WVSVC as an alter-ego of the NRSC hid the real identity of the Petitioners and projected a

false image that the "Ads" were produced by West Virginians.

(5) The "Ads" purported to set forth Respondent's legislative record when in fact they were a gross distortion of the record that reached absurd results and omitted significant parts of her record which deceived the voting public.

(6) Twelve days after the election, Welch, falsely stated to the press that "the state business community decided to do the independent advertising campaign against Pritt."

(7) On deposition, Welch professed that the "Ads" were an effort to truthfully report Respondent's record yet he admitted that he used the **"part of the voting record that perhaps would be most important to the people who are sponsoring the ad."**

The sin of "omission" can be as great and as effective as the sin of "commission" when the design of the actor is to deceive.

Argument in Response to RNC:

As required by law, the West Virginia Supreme Court reviewed the designated record *de novo,* considered the parties' briefs and conducted an oral hearing on October 3, 2001 and, on December 12, 2001, the Court unanimously decided that the lower court's decision should be reversed on the basis that that there were genuine issues of material fact which should be presented to a jury.

The Court remanded the case back to the Circuit Court of Fayette County for further proceedings and provided a survey of the applicable law as guidance

for continuation of the litigation including *New York Times v. Sullivan*[7], *Anderson v. Liberty Lobby*[8], *Harte-Hanks Communications, Inc. v. Connaughton*[9], *St. Amant v. Thompson*[10], *Masson v. New Yorker Magazine, Inc.*[11], *Sprouse v. Clay Communications*[12], *Hinerman v. Daily Gazette Co. Inc.*[13], *Long v. Egnor*[14], *Maynard v. Daily Gazette Co.*[15] and *Suriano*[16].

The following are misleading representations made by the RNC in their Petition concerning the West Virginia Supreme Court decision:

(1) At page 11, line 10 of their petition, the RNC states that "the Supreme Court of Appeals failed to conduct an 'independent review' of the record to assure that it contained the requisite clear and convincing evidence of actual malice." In the West Virginia Supreme Court decision at page 10a, line 5 the Court stated:

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[7] *New York Times Co. v.* Sullivan, 376 U. S. 254 (1964).
[8] *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986)
[9] *Harte-Hanks Communications Inc. v. Connaughton,* 491 U.S. 657 (1989).
[10] *St. Amant v. Thompson,* 390 U.S. 727, (1968).
[11] *Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496 (1991).
[12] *Sprouse v. Clay Communications, Inc.,* 211 S.E. 2d. 674 (1975).
[13] *Hinerman v. Daily Gazette Co.,* , 423 S.E.2d 560 (1992)
[14] *Long v. Egnor,* 346 S.E.2d 778 (1986)
[15] *Maynard v. Daily Gazette Co.,* 447 S.E.2d 293 (1994)
[16] *State ex rel. Suriano v. Guaghan,* 480 S.E.2d 548 (1996)

> "Also involved in this proceeding are numerous legal questions, the resolution of which is integral to the summary judgment ruling. In this regard, we likewise review anew a lower tribunal's determination of questions of law."

The challenged decision (and "Syllabus by the Court") makes reference to "clear and convincing" or "convincing clarity" **no less that ten times**. It can hardly be said that the West Virginia Supreme Court ignored or was unmindful of this principle.

(2) At page 19, line 11, the RNC states "Although the court recognized the general applicability of this heightened standard of proof, it deemed the standard 'no longer relevant' because the case 'cannot be disposed of summarily. App. 20a n. 14.'"

This footnote concerned the West Virginia Supreme Court's discussion as to whether "falsity must be shown by clear and convincing evidence." What the Court actually said was:

> "Although no longer relevant to the instant proceeding given that this case cannot be disposed summarily, we note that a public official opposing a summary judgment must **establish his/her *prima facie* case of defamation, and the elements thereof, by clear and convincing evidence.**" (emphasis supplied).

By deleting this section of the footnote, the Petitioner totally reversed what the Court said.

(3) Again, at page 21, line 10, the RNC restated this distortion of footnote 14 in support of the proposition that the West Virginia Supreme Court failed to observe the requirement of proof by "clear and convincing evidence" placed on a public figure.

(4) At page 23, line 11, the RNC stated, "As noted above, the West Virginia court conducted no factual review and failed to apply the proper evidentiary standard." What the Court said at page 15a, line 12 was, "With these principles in mind, and upon a review of the record submitted for appellate consideration in this case, we conclude that there are genuine issues of material fact so as to necessitate the presentation of this case to a jury." How can the Petitioner conclude the "court conducted no factual review".

Argument in Response to NRSC:

In support of their Motion for Summary Judgment and in support of their Petition for Writ of Certiorari the NRSC contends that the "Ads opposing Pritt" were truthful. An example of this oft repeated theme is at page 7, line 12 of the NRSC's Petition. "Mr. Welch believed that the statements in the advertisements were '[a]bsolutely truthful' and presented a 'fair and accurate portrayal of [Respondent's] voting record' on each one of the bills and amendments at issue."

At page 7, line 29, "Having completed his independent review, Mr. Engle was satisfied that the advertisements 'truthfully portrayed' both the legislation at issue and Respondent's vote on that legislation."

The NRSC's proof of "truthfulness" includes only (1) statements made by Welch in his deposition taken by the Respondent, (2) Craig Engle's affidavit and (3) distortions of answers by Respondent in her deposition. Other than this, Petitioners had no proof in regard to their defense that the "Ads opposing Pritt" are true. Petitioners, through Welch and Engle, were the "fabricators" of the "Ads opposing Pritt", as distinguished from merely repeating the allegations in the "Ads" such as a newspaper reporter would do.

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact (a jury) must determine whether the publication was indeed made in good faith. Profession of good faith will be unlikely to prove persuasive, for example, where a story is **fabricated** by the defendant, is the product of his **imagination**..." (Emphasis/ parenthesis added). *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968).

The definition of falseness is no mystery. In *Masson v. New Yorker Magazine,* 501 U.S. 496, 517 (1991) the Court answers "the question on falsity".

> "The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. See Restatement (Second) of Torts 563, Comment c (1977); W.

> Keeton, D. Dobs, R. Keeton & D. Owen, Proser and Keeton on Law of Torts 766 (5th ed. 1984)....Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'"

As the allegations in the "Ads opposing Pritt" are compared, on a one by one basis, with Respondent's legislative record on the subjects, we are left with the inescapable conclusion that the allegations in the "Ads" "have a different effect on the mind of the" listener or viewer "from that which the pleaded truth" of the record would produce.

Petitioners postulate that the lower Court's decision is in some manner superior to that of the West Virginia Supreme Court. What they don't tell us, however, is that Judge Vickers did not write the order granting summary judgment. Judge Vickers simply entered an order that Petitioners prepared and submitted without solicitation, approximately six months earlier.

In the pre-trial hearing on May 11, 2000, four days before entry of the order granting summary judgment, Judge Vickers expressed concern about "not having a clerk...the volume of the materials contained in the case" and it being "a little bit troubling to the Court when we've got to, in essence try these cases twice, oftentimes." His entry of summary judgment was not based on independent review of the record but instead was motivated by a desire to send the

case to the West Virginia Supreme Court and get the benefit of their ruling to avoid "try(ing) these cases twice".[17]

Throughout their Petition, the NRSC attacks the West Virginia Supreme Court decision with the proposition that the Court did not conduct an independent review of the record below. This is without merit.

At page 5a, the W. Va. Supreme Court stated:

> "Upon a review of the parties' arguments, the record submitted for appellate review, and the pertinent authorities, we agree with Ms Pritt that genuine issues of material fact do preclude the disposition of this matter by summary judgment."

Starting at page 9a, The West Virginia Supreme Court devoted one full section of its decision to the standard of review required for the case:

> "STANDARD OF REVIEW
>
> The instant appeal comes to this Court from decisions of the circuit court granting summary judgment in favor of RNC and denying Ms. Pritt's post-judgment motion.

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[17] Designated Record to the West Virginia Supreme Court at page 41.

> We typically apply a plenary review to an order of a circuit court deciding a summary judgment motion. "A circuit court's entry of summary judgment is review *de novo.*" Syl. Pt. 1, *Painter v. Peavy,* 451 S.E.2d 755 (1994). Also involved in this proceeding are numerous legal questions, the resolution of which is integral to the summary judgment ruling. In this regard, we likewise review anew a lower tribunal's determination of questions of law."

See also page 15a:

> "With these principles in mind, and upon a review of the record submitted for appellate consideration in this case, we conclude that there are genuine issues of material fact so as to necessitate the presentation of this case to a jury."

Including the three instances above, the West Virginia Supreme Court decision refers to their review of the record a total of six times. They also recite certain evidence taken from the record. This hardly sounds like they failed to conduct an independent review of the record before making their decision.

The proposition that the United States Supreme Court should grant certiorari to protect the First Amendment at this time is without merit. This case does no violence to the First Amendment nor does it threaten to do so. It is necessary to allow

the case to be fully developed to allow the measuring of the Respondent's Fourth Amendment rights against the First Amendment claim.

The First Amendment , part of the "Bill of Rights", is analogous to the English "Magna Charta" of 1215 and the English "Bill of Rights" of 1689. These three documents were written and designed to protect the people from action by the government; the Crown in the case of the England and the Federal Government in the case of the United States. The First Amendment was originally written and designed to give the citizens of the United States (the people) the freedom to speak their mind without fear of reprisal from the Federal government. **The First Amendment is not now, never has been, nor ever was intended to be a "license to lie".** It was never intended to deprive individuals of their right to defend their reputations in actions of libel.

Petitioner, NRSC, includes excerpts of the "record" which they contend demonstrates that the "Ads opposing Pritt" are true. These excerpts and their comparison with the "Ads opposing Pritt" shows that the "Ads" are **literally false.** The following response to the NRSC's Petition is parallel numbered.

1. To show that the allegation **"In the State Senate, Charlotte Pritt proposed teaching first graders about condoms"** is true, the NRSC refers to Senate Bill 531. (See page 20 of the NRSC's Petition).

Respondent was approached by her constituents about legislation of this nature and were sent to the Legislative Services to prepare the bill. The result, Senate Bill 531, which Respondent did not draft but did sponsor. Comparing the language of the "condom allegation" with the language of Senate Bill 531 shows the allegation is **literally false.** There is no mention of "teaching first graders about condoms". What was to be taught was to be determined by the school boards and approved by the parents. There was no such proposal by Respondent.

> "[T]he state board of education shall cause to be taught in all of the public schools of this state the subject of human growth and development, including the social aspects, contraception, diseases and *all other special instruction deemed appropriate and necessary by the state board. The state board shall determine the necessary time of instruction of human growth and development which shall be provided to grades kindergarten through twelve. Textbooks on the subject of human growth and development adopted for use in the public schools of the state shall contain appropriate material for teaching that subject.*
>
> *An opportunity shall be afforded to the parent or guardian of a child subject to instruction of the human growth and development course to examine the course curriculum requirements and materials to be used in such instruction.* (Underscore/italics provided).

It is absurd to conclude that the various school boards and the parents, all of whom would be involved in the decision making process, would determine that Bill 531 was a proposal for "teaching first graders about condoms." It is absurd to contend that proposed Bill 531 could truthfully be interpreted to be a proposal by Respondent for " teaching first graders about condoms."

The Uniform Statute and Rule Construction Act § 18(a) states: "A statute or rule is construed so as to avoid an unconstitutional, absurd, or unachievable result." *Lake City Corp. v. City of Mequon*, 558 N.W.2d 100 (1997) notes "It is a fundamental rule of statutory construction that any result that is absurd or unreasonable must be avoided."

At page 21 the NRSC is "boot strapping" it by distorting Respondent's deposition and suggest that she agreed that "sex education" for first graders included "instruction on 'contraception'".

2. At page 22 the NRSC cites Respondent's 1990 vote against an amendment to Senate Bill 184 to support the allegation that she "voted to permit the sale of pornographic Videos to children." This is a misinterpretation of the phrase "video movie which is rated 'X'". In 1990, "X" rated movies by the Movie Industry were the equivalent of today's PG-17 movies and were not pornographic. In 1990, "XXX" movies were considered as pornographic. The television version of this "pornographic allegation" completes the deception of this allegation with a subliminal back drop that shows a red "XXX".

3. At page 22, the NRSC cites a vote by Respondent against a proposed amendment to Senate Bill 639 as proof of the truthfulness of the allegation that "She even voted to allow convicted drug abusers to work in our public schools." This is literally false. No mention of the employment of "drug abusers in the public schools" is mentioned in the amendment. The false distortion of the meaning of her vote on this amendment is further apparent by the fact that **a majority of the Senate voted with her against this amendment.** It is absurd to say that the W.Va. Senate voted to allow the employment of "drug abusers in the public schools."

4. At page 23, the NRSC makes a bizarre effort to justify the conclusion that "... parents can't trust Charlotte Pritt to protect our children..."

On deposition, David Welch simply explained that since Charlotte Pritt had (1) proposed the teaching about condoms to first graders, (2) had voted for the sale of pornographic videos to children and (3) had voted to allow drug abusers to work in the public schools, parents couldn't trust her to protect their children. This allegation is based on the absurd, false distortions of the Respondent's legislative record.

Charlotte Pritt is a school teacher. **The allegation that "parents can't trust Charlotte Pritt to protect our children" is libel *per se.***"

5. At page 24, the NRSC relies on Respondent's vote against Concurrent Resolution 4

(CR 4) to support the allegation "**Charlotte Pritt voted against honoring the men and women of West Virginia who fought in the Gulf War.**"

CR 4 was a Resolution by the Senate that, in January of 1991, encouraged then President Bush to take steps to restore self government to Kuwait. The Senate Journal preliminary language, on page 57, dated January 14, 1991, is as follows:

"**House Concurrent Resolution No. 4**—Urging the President and the Congress of the United States to develop a policy to stop aggression by negotiation, or by force only if necessary, in order to restore self-government to Kuwait and stabilize relations of all countries in the Middle East."

The portion of CR 4 which the NRSC refers to was an amendment to the original resolution. The purpose of CR 4 was not to "honor the men and women of West Virginia who fought in the Gulf War". This language in the CR 4 was superfluous and was added to encourage passage of the Resolution. Respondent voted against U. S. Military involvement in the Mid-East, not against honoring the West Virginia Service men and women.

Later, the Gulf War situation was revisited by Legislature in February, 1992. House Joint Resolution No. 109 (HJR 109), a Veteran's Bonus, most of which went to the Gulf War veterans, was passed by the Legislature. Respondent voted for and spoke in favor of this bonus.

This is another example of deception by omission. To reach the conclusion presented by the

"Gulf war allegation", Petitioners selectively ignored the real purpose of CR 4 and ignored Respondent's vote for HJR 109 which "honored" the Gulf War Veterans by giving them a bonus.

6. At page 26, the NRSC distorts the effect of Senate Resolution 31 (SR 31). This resolution was not intended to "**allow** the burning of the American Flag". Quite simply, it was intended to ultimately lead to "criminalization" of the burning of the Flag. Prior to this the Court had addressed this question in the case of *Texas v. Johnson*[18] where the Court said the "burning of the flag...is expressive conduct" protected under the First Amendment freedom of speech. The question before the Senate was not the "allowing of the burning of the Flag" The question was whether to pass a resolution which would have encouraged the criminalizing of the burning of the flag.

7. At page 27, the NRSC refers to Respondent's vote against House Bill 1193 (HB 1193). This Bill made it mandatory for "the Pledge of allegiance to the United States flag in public schools at the start of every instructional day". It also exempted students who for religious or moral reasons felt they could not make this pledge. An amendment was proposed that excused teachers on the same basis on which students were excused. The Respondent voted for this amendment but it was defeated. Respondent voted against the bill since it did not provide for excusing the teachers. Delegate

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[18] *Texas v. Johnson,* 491 U.S. 397 (1989).

Casey spoke explaining the vote against the Bill was because to "require the teachers to participate is unconstitutional in addition to being illogical".

VII. *SPROUSE V. CLAY COMMUNICATIONS:*

The Petitioners cite a total of 94 decisions in their Petitions, including 29 citations that involve state court decisions. One decision, *Sprouse v. Clay Communications, Inc.*, 211 S.E.2d. 426, is noticeable absent, notwithstanding that this decision was cited in all prior briefs by the Petitioners.

Sprouse was an attorney with approximately 17 years experience. He was the Democratic nominee for governor in 1968. On the eve of the election the Charleston Daily Mail (Daily Mail), owned by Clay Communications, Inc., fabricated and published a series of false negative articles about Sprouse that libeled, slandered and defamed him. The Daily Mail had many readers in Fayette County and was widely distributed throughout the state.

Sprouse brought a libel action in state court (Circuit Court of Fayette County, West Virginia).

Sound familiar?

After a jury trial, Sprouse prevailed and judgment was entered for the jury award. Clay Communications appealed resulting in the decision cited above. Clay Communications petitioned the United States Supreme Court for a writ of certiorari. The American Newspaper Publishers Association were granted leave to file an *amicus* brief. A writ of certiorari was denied. See 423 U.S. 882.

Sprouse was one of the first decision to determine that *New York Times v. Sullivan* applied to a candidate for public office. It was also one of the first decisions requiring that "actual malice" be proven by "clear and convincing evidence". *New York Times v Sullivan* involved elected law enforcement officials who were granted a jury award against the *Times.* The *Times* decision did not use "clear and convincing" but instead concluded "lacks the convincing clarity which the constitutional standard demands".[19]

The *Sprouse* decision is so parallel to our present fact scenario that is unconscionable to omit discussion of it in a brief concerning this case.

VIII. CONCLUSION:

Respondent concludes with the following:

(1) The West Virginia Supreme Court' decision is not a "final Judgment" as contemplated by 28 U.S.C. § 1257(a).

(2) There is no "compelling reason", as contemplated by Rule 10, for the Court to review this case by granting certiorari.

(3) The RNC and NRSC Petitions do not fairly portray the West Virginia Supreme Court decision and are misleading.

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[19] *New York Times v. Sullivan*, 376 U.S. 254, 285/286 (1964)

(4) The NRSC Petition does not accurately portray the "facts" of this case and is misleading.

(5) A writ of certiorari should not be granted on speculation by the Petitioners that there may, in the future, be some violation of their rights protected under the First Amendment.

(6) The "Ads opposing Pritt" were not "robust political discussion" as protected by the numerous First Amendment decisions. These "Ads" were pure, unadulterated character assassination of a candidate for a state office, by a national political organization that had unlimited funds, in an effort to control a state election.

(7) The proof of falseness of the "Ads opposing Pritt" is demonstrated by: (a) Comparison of Respondent's record with the "Ads", (b) Respondent's point by point response to the NRSC at pages 21 through 27, (c) the testimony of witnesses Withers and Sattes which was improperly excluded by the lower court and (d) the testimony of Respondent.

(8) The proof of "actual malice" is demonstrated by (a) David Welch's admission that he only used the part of Respondent's record that would be of interest to the Petitioners, (b) the refusal by the Petitioners to consider terminating the "Ads opposing Pritt" when requested to do so by her opponent (c) the pattern of deception surrounding the broadcasting of the "Ads" which destroys the credibility of the Petitioners and supports the conclusion that they did

know the "Ads" were false or did publish them with willful disregard of their truth or falsity.

(9) It is necessary to let the subject case go forward and allow the parties to fully develop their portions of the case in order to protect the Respondent's rights under the Fourth Amendment.

(10) Petitioners' position that greater weight should be given to the Circuit Court's decision granting Summary Judgment than the decision by the West Virginia Supreme Court reversing that decision and remanding for trial is unfounded.

(11) The "guidance" set forth in the West Virginia Supreme Court's decision assures that the case will be tried under the applicable law as found in the various decision by the United States Supreme Court. This case does not threaten to do any violence to the First Amendment.

For the foregoing reasons, a writ of certiorari, summarily reversing the judgment of the West Virginia Supreme Court, should **not** be granted.

Respectfully submitted,

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(3)

Supreme Court, DC.
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No. 01-1328

IN THE

Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE,

Petitioner,

v.

CHARLOTTE J. PRITT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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1499

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. THIS COURT HAS JURISDICTION TO REVIEW THE DECISION BELOW 3

II. THE DECISION BELOW CONTRAVENES SETTLED FIRST AMENDMENT LAW 5

III. THE *SPROUSE* CASE CONFIRMS MS. PRITT'S FAILURE TO ADDUCE EVIDENCE OF ACTUAL MALICE 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Page

ASARCO, Inc. v. Kadish,
490 U.S. 605 (1989) 3

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 2, 5

Bose Corp. v. Consumers Union of the U.S., Inc.,
466 U.S. 485 (1984) 2

Buckley v. Valeo,
424 U.S. 1 (1976) 3

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 (1975) 3, 4

Federal Elec. Comm'n v. National Conservative Pol. Action Comm.,
470 U.S. 480 (1985) 1, 2

Fort Wayne Books v. Indiana,
489 U.S. 46 (1989) 4

Harte-Hanks Communications, Inc. v. Connaughton,
491 U.S. 657 (1989) 10

Kalwar v. Liberty Mutual Ins. Co.,
506 S.E.2d 39 (W. Va. 1998) 7

Miami Herald Publishing Co. v. Tornillo,
418 U.S. 241 (1974) 4

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 2

O'Dell v. Espinoza,
456 U.S. 430 (1982) 4

Philadelphia Newspapers, Inc. v. Hepps,
475 U.S. 767 (1986) 4

Sprouse v. Clay Communications, Inc.,
158 W. Va. 427 (1975) 8, 9

State ex rel. Cooper v. Caperton,
196 W. Va. 208 (1996) 7

STATUTES

28 U.S.C. § 1257(a) 3

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

The Brief in Opposition filed by respondent Charlotte Pritt ("Br. Opp.") fails to address key elements of the Petition for a Writ of Certiorari filed by petitioner Republican National Committee ("RNC") on March 7, 2002.[1]

First, Ms. Pritt asserts that there is "no compelling reason" for the Court to grant the RNC's Petition because it is ~~purportedly based on mere~~ "~~speculation that in the future~~, [petitioners] may be denied some constitutional protection." Br. Opp. at 6. Far from the realm of speculation, however, the decision of the Supreme Court of Appeals has *already* had far-reaching impact well beyond the parties to this case. As the RNC has explained (RNC Pet. at 24-27), the decision below institutes a coercive threat of defamation litigation, not terminable by summary judgment even in wholly meritless cases, that inevitably chills free speech and open debate for all political speakers in West Virginia and adjacent states. Ms. Pritt ignores these consequences of the decision below.[2]

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[1] The RNC does not substantively discuss herein Ms. Pritt's arguments that are directed solely to the separate Petition filed by petitioner National Republican Senatorial Committee ("NRSC") on March 8, 2002. *See generally* Br. Opp. at 16-27. The RNC understands that the NRSC has filed its own Reply Brief to address these issues.

[2] Ms. Pritt also suggests that political committees such as the RNC and the NRSC are not entitled to the same First Amendment protections that are afforded to the press and candidates for office. *See* Br. Opp. at 7-8. This contention is simply wrong. This Court has specifically ruled that political committees "produce speech at the core of the First Amendment," and thus the Court "reject[ed] the notion" that political committees' "form of organization or method of solicitation diminishes their entitlement to First Amendment protection." *Federal* (continued...)

Second, Ms. Pritt ignores the glaring deficiency of the decision below, which set out *no facts* bearing on actual malice. Instead, the Supreme Court of Appeals concluded that the mere existence of a disagreement between the parties about the content of the record evinced unidentified "issues of material fact" that rendered the clear and convincing evidence standard *inapplicable*. *See* RNC Pet. App. 15a, 20a n.14. The lower court simply declined to conduct an independent review of the purported evidence of actual malice to determine whether it was (or was not) sufficient to avoid summary judgment. This maneuver contravened the many rulings of this Court that have emphasized two related rules imposed by the First Amendment in public figure defamation cases: (1) to avoid summary judgment, plaintiffs must come forward with clear and convincing evidence that defamatory statements were made with actual malice; and (2) appellate courts must independently review the factual record to determine whether such evidence exists. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964); *Bose Corp. v. Consumers Union of the U.S., Inc.*, 466 U.S. 485, 510-11 (1984); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 256 (1986). *See also* RNC Pet. at 12-18.

Third, Ms. Pritt ignores the patent conflict between the decision below and rulings from the vast majority of other state high courts and federal circuit courts of appeals. Unlike the Supreme Court of Appeals, the vast majority of lower appellate courts regularly perform full *de novo* review of the evidence adduced in public figure defamation cases and describe the pertinent facts in detail. *Id.* at 19-23. Ms. Pritt neither acknowledges nor addresses this conflict.

Elec. Comm'n v. National Conservative Pol. Action Comm., 470 U.S. 480, 493-94 (1985).

Finally, as discussed herein, Ms. Pritt also advances several insubstantial affirmative arguments, none of which squarely address the RNC's Petition.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW THE DECISION BELOW.

Ms. Pritt claims that the decision below is neither a final judgment under 28 U.S.C. § 1257(a), nor subject to any of the exceptions to the "final judgment rule" that this Court established in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975). *See* Br. Opp. at 2-5. However, Ms. Pritt ignores the very two exceptions on which the RNC relies (RNC Pet. at 2), namely that (1) this is a case in which "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action" *and* (2) refusal of immediate review by this Court "might seriously erode federal policy." *Cox*, 420 U.S. at 482-83. Because Ms. Pritt has identified no probative evidence of actual malice by any of the defendants below, a reversal by this Court would result in the reinstatement of summary judgment on Ms. Pritt's claims, thus precluding further litigation. Moreover, a refusal of immediate review by this Court would seriously erode the federal policy of protecting core political speech, an "area of the most fundamental First Amendment activities." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). *See* RNC Pet. at 24-27.

Instead of addressing these plainly applicable exceptions, Ms. Pritt suggests that they were nullified by *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989). *See* Br. Opp. at 3. In that case, the Court discussed and applied two *Cox* exceptions to the "final judgment rule" that the RNC has not invoked, but nowhere did the Court purport to limit or modify *Cox*. *See* 490 U.S. at 611.

Ms. Pritt also cites the Court's per curiam dismissal of certiorari in *O'Dell v. Espinoza*, 456 U.S. 430 (1982), to insinuate that the "final judgment rule" categorically proscribes review of a case that is subject to further proceedings in a lower court. *See* Br. Opp. at 2-3. To the contrary, the Court in *O'Dell* explicitly recognized the "set of situations in which we have found finality as to the federal issue despite the ordering of further proceedings in lower state courts." 456 U.S. at 430 (citing *Cox*, 420 U.S. 469). *See also Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (granting certiorari and reversing decision of state supreme court that had reversed a verdict and remanded a defamation case for a new trial).

Further, Ms. Pritt attempts to distinguish the cases supporting this Court's jurisdiction (RNC Pet. at 2-3) by noting that they, unlike this case, involved challenges to the constitutionality of state statutes. *See* Br. Opp. at 3-5. This simplistic "distinction" lacks substance. The decisions cited by the RNC were rooted in this Court's fundamental protection of speakers' rights under the First Amendment, regardless of the method of infringement. The mere fact that these cases involved the evaluation of a state statute does not undermine their applicability here.

In *Fort Wayne Books v. Indiana,* 489 U.S. 46 (1989), the Court observed that "[a]djudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits an exception to the general finality rule." *Id.* at 55. The Court in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), ruled that "it would be intolerable to leave unanswered" an important First Amendment issue pending a trial because "an uneasy and unsettled constitutional posture" can only harm free speech. *Id.* at 247. Similarly, the Court in *Cox* refused to delay "final decision of the First Amendment claim until after trial." 420 U.S. at 485-86. In none of these cases did

the Court limit its reasoning or conclusions to scenarios involving only challenges to state statutes, and such a limitation cannot properly be inferred.

Finally, as Ms. Pritt herself acknowledges (Br. Opp. at 11), *Anderson v. Liberty Lobby* came to this Court in a procedural posture identical to this case. In *Anderson*, the district court granted summary judgment in favor of a defendant in a public figure defamation action, the D.C. Circuit reversed and remanded the case for trial, and this Court granted certiorari and reversed the D.C. Circuit. *See* 477 U.S. at 246-47, 252. The Court in *Anderson* recognized the fundamental First Amendment purposes served by the independent appellate review of evidence purportedly demonstrating actual malice, and thus exercised jurisdiction despite the pendency of further proceedings in a lower court. For the same reasons, this Court should exercise jurisdiction and grant certiorari to review the decision below.

II. THE DECISION BELOW CONTRAVENES SETTLED FIRST AMENDMENT LAW.

As the RNC has demonstrated, the Supreme Court of Appeals fundamentally misunderstood or ignored its responsibilities under the First Amendment. *See* RNC Pet. at 8-12, 18-19. The court set out *no facts* bearing on actual malice, and instead concluded that the mere existence of a disagreement between the parties about the content of the record was sufficient to show the existence of "issues of material fact," and thus render the clear and convincing evidence standard *inapplicable*. *See* RNC Pet. App. 15a, 20a n.14.

Ms. Pritt attempts to bolster the decision below by accusing the RNC of making "misleading representations" about the decision. Br. Opp. at 14. In fact, it is Ms. Pritt who now offers faulty rationalizations for the lower court's deficient analysis.

Ms. Pritt asserts that the Supreme Court of Appeals cannot have been "unmindful" of the clear and convincing evidence requirement because the decision below refers to the requirement "no less than ten times." *Id.* at 15. What matters, of course, is not whether the court was "mindful," in the abstract, of its First Amendment responsibilities, but whether it understood and fulfilled them. Here, the court paid lip service to its duty but ultimately brushed it aside, ruling that the clear and convincing evidence standard was "no longer relevant" because the case "cannot be disposed of summarily." RNC Pet. App. 20a n.14. As the RNC has shown (RNC Pet. at 19), this conclusion is precisely *backwards*, because a proper decision that summary judgment was inappropriate could only have been based on a prior finding of clear and convincing evidence of actual malice.[3]

Ms. Pritt also professes amazement at the RNC's contention that the Supreme Court of Appeals "conducted no factual review and failed to apply the proper evidentiary standard" (RNC Pet. at 23), because the court made passing reference to its "review of the record submitted for appellate consideration." Br. Opp. at 16. "How," Ms. Pritt therefore wonders, "can the Petitioner conclude the 'court conducted no factual review?'" *Id.* As the RNC has explained, the text of the decision below reveals no such review. The West Virginia court set out no facts bearing on actual malice, but

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[3] Ms. Pritt now asserts that the RNC *concocted* the lower court's abandonment of the clear and convincing evidence standard, but she quotes the very language from the decision below that proves the RNC is correct. *See* Br. Opp. at 15-16. Ms. Pritt also states that this language was restricted to the element of falseness in a public figure defamation case (*id.* at 15), but the court's quoted statement expressly pertained to *all* elements of a "prima facie case of defamation," including actual malice. *Id.* (quoting RNC Pet. App. 20a n.14).

instead retreated to the "dispute" between the parties about whether such evidence existed. *See* RNC Pet. App. 15a, 20a n.14. One would suppose that every public figure defamation plaintiff will *claim* the record contains evidence of actual malice, but the West Virginia court committed a serious legal error by assuming that Ms. Pritt's claim was sufficient to comply with this Court's rulings in *Bose*, *Anderson*, and their progeny.[4]

Indeed, Ms. Pritt cannot, even at this late date, identify any probative "evidence" of actual malice. Her effort to muster evidence of actual malice -- the central issue in this case -- comprises but one paragraph on the penultimate page of her brief. *See* Br. Opp. at 29-30.

First, Ms. Pritt criticizes David Welch for focusing only on those portions of her legislative record that he considered relevant to the central message of the advertisements at issue. *Id.* at 29. Putting to the side the practical considerations of trying to discuss Ms. Pritt's *entire* legislative record in a 30 (or 60) second spot, Mr. Welch's decision to focus on particular votes in no way undermines his testimony that the advertisements were "absolutely true." Welch Depo. Tr. at 88. *Second*, Ms. Pritt highlights the NRSC's decision to continue airing the independent expenditures despite objections from Ms. Pritt's Republican opponent (Br. Opp. at 29), but this too is immaterial to actual

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[4] In an unavailing attempt to defend the decision below, Ms. Pritt criticizes the trial court for its entry of a summary judgment order that was drafted by counsel for defendants (Br. Opp. at 18), but this practice has been approved by the Supreme Court of Appeals. *See Kalwar v. Liberty Mutual Ins. Co.*, 506 S.E.2d 39, 44 (W. Va. 1998); *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 214 (1996). Further, taken at face value, Ms. Pritt's criticism of the trial court would *highlight* the need for independent appellate review of the evidence bearing on actual malice.

malice because (as her opponent's letter on this point stated and as he testified) the objection was merely to the "tone" of the advertisements and in no way suggested that any of the statements at issue were false, let alone knowingly so. *See* Underwood Depo. Tr. at 10-11, 20. *Finally*, Ms. Pritt asserts a "pattern of deception surrounding the broadcasting of the ads" (Br. Opp. at 29), presumably referring to certain claimed inaccuracies in Mr. Welch's account of how the spots were funded. *Id.* at 12-13.[5] Even if true, Ms. Pritt's assertions have nothing to do with "actual malice," namely whether Mr. Welch knew the statements in the spots were false or recklessly disregarded their falseness.

Even these allegations, insufficient as they are, exceed the West Virginia court's analysis of the actual malice issue. The lower court's decision presents an important issue that, we respectfully submit, well merits consideration by this Court.

III. THE *SPROUSE* CASE CONFIRMS MS. PRITT'S FAILURE TO ADDUCE EVIDENCE OF ACTUAL MALICE.

Finally, Ms. Pritt takes note of the West Virginia court's decision in *Sprouse v. Clay Communications, Inc.*, 158 W. Va. 427 (1975), because, in her view, it "is unconscionable to omit discussion of it in a brief concerning this case." Br. Opp. at 28. Of course, the lower court's decision in *Sprouse* is not binding on this Court. More importantly, the decision supports the RNC's Petition.

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[5] The West Virginia State Victory Committee was formed not for nefarious purposes, but to comply with West Virginia state law, which required formation of a separate political committee for the airing and reporting of independent expenditures.

In *Sprouse*, the Supreme Court of Appeals affirmed in part and reversed in part a jury verdict finding that a newspaper had willfully entered a scheme with plaintiff's gubernatorial opponent to publish false headlines about plaintiff, in knowing disregard of journalistic standards. *See* 158 W. Va. at 429. Here, in contrast, there is simply *no* probative evidence that the statements at issue were false, much less that the NRSC (or the RNC) acted with actual malice. *See* NRSC Pet. at 20-27; *see also* RNC Pet. at 6 n.3. The decision below is conspicuously devoid of any such evidence.[6]

Notably, the *Sprouse* decision recognized that:

> *[A] political campaign necessarily involves intent on the part of one political group to "injure" opposition candidates by depriving them of elective office.* In libel law, "malice" has a much narrower definition and requires not only a deliberate intent to injure, but also an intent to injure through the publication of false or misleading defamatory statements *known by the publisher or its agents to be false*, or an intent to injure through publication of such defamatory statements with *reckless and willful disregard for their truth.*

158 W. Va. at 433 (emphasis added).

Accordingly, even the *Sprouse* decision demonstrates that Ms. Pritt cannot sustain her burden of proving actual malice by mere reference to the fact that the advertisements at issue were unflattering and part of a concerted political

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[6] Further, although the RNC contends, and the trial court found, that the statements at issue were *true* (RNC Pet. at 6 n.3), this question is separate and apart from whether the RNC or the NRSC acted with actual malice.

effort to defeat her candidacy for Governor of West Virginia. *See also Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 665-66 (1989) (speaker's intent to promote one candidate for elected office over another does not establish actual malice). Read broadly, however, this is the maximum extent of Ms. Pritt's "evidence" of actual malice.

CONCLUSION

For the reasons stated herein, petitioner Republican National Committee respectfully urges this Court to grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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